STATE RESPONSIBILITY FOR CHILDREN IN CARE

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DECLARATION CONCERNING THESIS PRESENTED FOR THE

DEGREE OF DOCTOR OF PHILOSOPHY

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ABSTRACT

Children and young persons who have been removed from their families and who will not be returned to their families of birth following intervention by the State are amongst the most damaged and vulnerable children in society. They often present with a myriad of physical and especially psychological and emotional problems that originate from their biological history, in the reasons that led them to be taken into care, and, regretfully, also from their experiences while being parented when in the care of the State. This thesis explores the parameters of the ‘responsibility’ that the Chief Executive of the Ministry of Social Development assumes on behalf of the State in relation to those children who have been taken into its care and who will not be returned to their parents. What is meant by both ‘state,’ and ‘responsibility’ and what constitutes ‘permanency’ in this specific context, is explored.

The history of state involvement in children’s lives is outlined, together with discrete themes that run through that history, including the development of the parens patriae and wardship jurisdictions from the 15th century to the present day. The statutory initiatives of the 19th and early 20th centuries that have their direct antecedents in the reaction of the enlightened state to the rigours of industrialisation, and of colonisation are also explored.

Two hypothetical case studies of children in care are presented to illuminate the common issues and themes that permeate permanency cases. The experiences of these children are discussed in several chapters to illustrate and highlight matters pertinent to the welfare and best interests, not only of the permanently placed child, but also for his or her new ‘forever’ family.

Particular attention is given to Māori children who are removed from their families and permanently placed because of the status Māori have in New Zealand society and the value they attribute to families and children. In one sense, the issues Māori children who must be permanently placed are precisely the same as those for non-Māori children – of securing the child in the new placement. However, this can be a more profound dynamic for Māori children because of the need to ensure that the necessary connections are made to the child’s culture and language.

A comprehensive analysis of the applicable statutory framework is undertaken. This identifies that the effect of a custody order under s 101 of the Children, Young Persons and Their Families Act 1989 is, by virtue of the operation of s 104 of that Act, the same as if a parenting order had been made under the Care of Children Act 2004 in respect of the child. The consequence is that the Chief Executive has, as a matter of law, precisely the same responsibilities to that child as does any parent of their own child. However, the context has some significant differences in that the child who is removed from their birth family is likely to have been profoundly abused. This places an enhanced responsibility, both legal and moral, on the Chief Executive.

Given the fact of removal, the thesis explores the desired outcome for these children who have been taken into state care. There are a number of outcomes that the State could reasonably be expected to attain for them. These include ensuring that the child is safely cared for and that the abuse or neglect previously experienced does not recur; that where the child has suffered demonstrable harm, ensuring that the impact of that harm is remedied for the future well-being of that child; that the child is nurtured and cared for by a new family; that this occurs within an appropriate legal framework which enhances the well-being of the child; and having
regard to the child’s care and protection and care legacies, the child is as well prepared for independence as any other child in society.

The legal framework quite clearly places the Chief Executive in the shoes of the person who would otherwise be the parent of the child. This gives rise to the creation of a social contract between the Chief Executive and those carers who assume the task of caring for the permanently placed child on behalf of society. They will be providing a home for that child through to the child becoming independent and entering adulthood. The thesis questions whether the State, through the office of the Chief Executive has succeeded in meeting the obligations under that social contract.

In August 2013 the Minister of Social Development, the Hon. Paula Bennett, introduced the Vulnerable Children Bill into Parliament. If the Bill is enacted in the form it was introduced, then it is likely there will be significant changes to how children in permanent placements are supported. Reference is made to the Bill and its possible consequences in Chapter 14.

The thesis concludes that the State has a responsibility to children in the care of the State which commences from the time a child is placed in the custody of the Chief Executive and that, in the case of children who cannot be returned to families, continues through to the time that the consequences of abuse/neglect suffered are remedied and/or the young person ages out of care. This is both a retrospective and prospective responsibility. The State has a duty to look to the child’s overall well-being of the child given the fact of intervention and removal of the child from his or her parents and their failure to safely parent their child. In respect of children who are permanently placed, the thesis proposes that a social contract exists between the caregivers of those children and the State.
PREFACE

In 2007 I enrolled with the Children’s Issue Centre at the University of Otago to undertake the Postgraduate Diploma in Child Advocacy. That course of study ultimately led to the selection of my topic for this PhD which I commenced 2009. Completing both the Diploma and, particularly, this thesis has been a labour of love and I am indebted to my wife, Sue Alpass, for her forbearance and accepting that she would have to spend evenings, weekends and holidays on her own as I immersed myself in my studies. I am looking forward to reintroducing myself to her.

I have been working fulltime as a barrister (specialising in family law) during the time of writing this thesis. This has merely emphasised my absences from family life. It has also meant a far greater burden fell on to the shoulders of my PA, Tania Brooker, who has vigilantly tried to ensure that I did not over burden myself with work and that I kept my Fridays free to work on the thesis. That I took on too much work at times and did not keep Fridays a work free space is no fault of hers. I owe Tania a tremendous debt.

My supervisors are Professor Mark Henaghan and Associate Professor Nicola Taylor. Mark has provided me with the ‘big picture’ perspectives; Nicki, has immersed herself in the detail of the each sentence and paragraph as well as making sure that I kept on target in terms of the overall objective. I am grateful to both for their wisdom and support throughout my time at Otago University.

As a student working in Auckland I have had to call on the services of the library and its distance service. The staff has been unfailing in their assistance to me and I record my thanks to them. I have also had occasion, usually once a year to spend a few days in Dunedin and have been able to work in the Law Library. Again, I offer my thanks to the assistance and kindness of the staff.

Dr Suzanne Blackwell read a late draft of the thesis and offered me valuable critical comment from her perspective as a clinical psychologist well-versed in the Family Court and with the issues presented by and on behalf of children in care. Dr Sarah Calvert offered me useful insight into the Home for Life policy of the Chief Executive and its deficiencies, this coming from her perspective of many years working as a clinical psychologist with the Department of Child, Youth and Family Services and then in private practice writing reports for the Family
Court. Thanks are also due to many legal colleagues, of whom there are too many to name. However, I do want to acknowledge Tania Williams, Barrister of Hamilton, who read Chapter Eight and provided very helpful feedback on that chapter and sent me statistics relating to children in care that she had obtained from the Department of Child, Youth and Family Services.
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Abbreviations, Definitions and Expressions Used in this Thesis

The specialist nature of the care and protection field necessitates an understanding of the commonly used expressions and terms used in this thesis. A number of Māori words are used. In accordance with the modern idiom the tohu tō (ā, ū) (macron) is used, for example, as in Māori and hapū. (Where a direct quote has not used the tohutō it is not then reproduced.)

Access/contact
The term ‘access’ as used in the Children, Young Persons, and Their Families Act 1989 is synonymous with the expression ‘parenting order for contact’ as used in the Care of Children Act 2004. The Guardianship Act 1968 (the predecessor to the Care of Children Act) also used ‘access’. In this thesis both ‘contact’ and ‘access’ will be used depending on the statutory context. ‘Access’ is the period of time a child may spend with his parents (or family or whānau) having been removed from their birth family through the intervention of the State. In the private law context of the Care of Children Act, contact is the time a child spends with the parent who does not have the responsibility of providing day-to-day care.

Care of Children Act 2004
This is the private law statute that regulates the relationships that exist between parents and children. It is the most commonly used vehicle to provide a legal framework for children who have been permanently placed into new families. This reflects both the cessation of public law intervention and the recognition in private law of a new family unit of which the child is now a member. The new parents will have the benefit of a parenting order granting them day-to-day care of the child. This is synonymous (in a general sense) with the expression ‘custody’ that is used in the Children, Young Persons, and Their Families Act. The Guardianship Act also used the expression ‘custody’.¹ Throughout the thesis I refer to the Care of Children Act as ‘COCA’.

¹ There is further and substantive discussion of the meaning and effect of these expressions in Chapter Six.
Chief Executive
The Chief Executive of the Ministry of Social Development is responsible for the administration and operation of the Children, Young Persons, and Their Families Act 1989. This is the statutory person in whose name children are placed in custody or under guardianship. In the thesis the Chief Executive is also referred to by the words ‘he’ or ‘his’, reflecting that the current occupant of the position is male.

Child[ren] and young person[s]
The expressions ‘child’ and ‘young person’ will be used in this thesis in accordance with the definitions found in s 2 of the Children, Young Persons, and Their Families Act. A ‘child’ is a boy or girl under the age of 14 years. A ‘young person’ is a boy or girl of or over the age of 14 years, but under the age of 17 years. For convenience, I mostly use the expressions ‘child’ and ‘children’ to cover both children and young people. Where this does not occur the context will require use of that specific expression.²

The Children, Young Persons, and Their Families Act 1989
This is the public law instrument that authorises state intervention in families when children are at risk of, or who have suffered abuse and neglect. It sanctions the permanent placement of children when it is not possible for them to return to those previously having care of them. References in the text to either the ‘CYPF Act’ or ‘the Act’ are to this statute. This will be clear from the context.

Custody
When a child is removed from the care of its parents by order of the Family Court following an application made by the Chief Executive under the Children, Young Persons and Their Families Act an order will be made for the Chief Executive to assume custody of the child in the place of those who previously had that legal right. This confers on the Chief Executive the right in law to firstly, remove the child from those previously having care of the child and, secondly, the power in law to place the child with caregivers approved by the Chief Executive. When a child is to be permanently placed, this order in conjunction with appointment as a guardian provides the necessary legal basis for the role that the Chief Executive undertakes in terms of parental responsibility for that child.

² The use of ‘child’ is also (more or less) congruent with Article 1 of the United Nations Convention on the Rights of the Child, where a ‘child’ is defined as every human being under the age of eighteen years of age, unless under national law the child earlier attains the age of majority.
CYFS

The acronym used to denote the Department of Child Youth and Family Services, a division of the Ministry of Social Development, and charged with the administration of the Children Young Persons & Their Families Act.

FGC

The family group conference is the dynamic vehicle at the centre of the Act. The function of the conference is to determine whether a child is in need of care and protection, and, if that is the outcome, what intervention should then follow.3

Foster (or Substitute) Care

This is when a child is cared for in a family other than their own. A foster care placement may range from the provision of daily minding through to what is effectively a permanent placement for a child. In New Zealand and England, foster care does not include residential care; however, it does in the United States.4

Guardianship

In private law, ‘guardianship’ encompasses the duties, powers, rights and responsibilities (the ‘incidents’ of guardianship) that a parent obtains on the birth of a child in relation to the upbringing of that child.5 Guardianship requires guardians to foster the intellectual, emotional, physical, social, cultural and personal development of the child. Under the Care of Children Act, guardianship terminates on the child turning 18 years of age.6 Under the Children Young Persons & Their Families Act the status can continue till the child attains the age of 20 years. In permanency cases this order, together with that for custody, provides the legal framework required by the Chief Executive in assuming parental responsibility for that child.

3 This may involve proceedings through the Family Court. Where proceedings are taken directly to the Family Court because of the risks perceived as existing for the child, although the Court can make orders to ensure the immediate safety of the child if required, a formal declaration that the child is in need of care and protection cannot be made until the family group conference has been convened and considered the case.


5 COCA, s 15(a).

6 COCA, s 16(1)(b). (A ‘child’ is defined as a person under the age of 18 years. See s 8 of COCA.)
Home for Life policy
This is the policy introduced in late 2010 by the Hon. Paula Bennett, Minister of Social Welfare. It provides the administrative framework for the permanent placement of children who are in the custody of the Chief Executive and who will be placed in new families. The policy prescribes the desired legal framework that accompanies the policy together with the structure of social work support that will be provided to the child and his or her new caregivers. The policy is discussed in detail in Chapters Eleven and Twelve. However, reference to it also occurs in a number of places in earlier chapters.

Kin/Non-Kin Placements
A ‘kin placement’ is a one in which a child is placed with a member of the child’s family (or wider family group), irrespective of how distant the actual relationship may be. This is in contrast to a ‘non-kin placement’, in which a child is placed with a family with whom they have no familial connection. That the child may not, in fact, ‘know’ the intended kin caregivers, and they are as much strangers to that child as any non-kin placement caregivers may be is irrelevant for classification purposes.

Ministry of Social Development
The Ministry of Social Development (‘MSD’) is the organ of state responsible for the policy development and administration of social services. This includes both the child protection and youth justice sectors by way of the Children Young Persons and Their Families Act and the financial support limb (unemployment, sickness, domestic purposes and invalids benefits) administered via the Department of Work and Income Services.

NGO
Non-Governmental Organisations. A number of organisations operate in the social services sector. However, for the purpose of this thesis it means those providing care to children who are in the custody of the Chief Executive, such as Barnardos, The Open Home Foundation and Youth Horizons Trust.

Parenting Order
A parenting order is an order made by the Family Court under Care of Children Act in respect of the day-to-day care of and contact to a child.
The Protection of Personal and Property Rights Act 1988

The Protection of Personal and Property Rights Act (PPPR Act) is designed to provide a vehicle for decision-making in respect of both personal care and welfare and the management of property for those over the age of 18 years who, by virtue of cognitive impairment, are incapable of doing so themselves. The Act imposes certain thresholds: for the appointment of a welfare guardian under s 12, the Court must be satisfied that the subject person is wholly incapable of making or communicating decisions in regard to their personal care and welfare (or specific aspects of their welfare). For the appointment of a property manager under s 25, there must be at least partial incapacity before a manager can be appointed. This extent of the management will have regard to the nature of the subject person’s incapacity. This Act also involves a range of ‘personal’ orders set out in s 10 of that Act. For example, a person may be provided with living arrangements of a type specified in the order if the Court is satisfied the person lacks the requisite capacity. These personal orders are particularly relevant to a limited number of young persons in custody of the Chief Executive, who must be transitioned from care on their attaining the age of 17 years.
CHAPTER ONE

Introduction

1.1 What this thesis is about
This thesis concerns children in New Zealand who, having been removed from their birth families by the State, are in the care of the State through the operation of the Children, Young Persons and Their Families Act 1989 (‘CYPF Act/the Act’). Those children may be placed in new families (and ultimately under the private law framework of the Care of Children Act 2004 (‘COCA’) or, may remain in state run (or state contracted) accommodation until they age out of care. The thesis argues that, as a matter of law, the responsibility of the State to care and provide for these children is precisely the same as the responsibility that a natural parent has to his or her children but with this responsibility being accentuated by the fact of the child having usually been so profoundly abused or neglected that return to the birth family is untenable. Further, the responsibility assumed is to nurture the child through to independence so that the child leaves care in the best position possible to live an independent life as a contributing member of society. This responsibility endures from the time a child is placed in the custody of the Chief Executive by an order of the Family Court, and with the Chief Executive being appointed as a guardian of the child. It is further reinforced by the application of specific provisions of the Act – ss 4(c), 6, 7 (1), (2)(a) and (b), 13(a), (f)(iii) and (h) – and Articles 20 and 39 of the United Nations Convention on the Rights of the Child.

The responsibility to care and provide must also have regard to the consequences of the child’s journey through care before a permanent new family is found. This is because some children will experience multiple foster placements or may even suffer further abuse/or neglect when in care, including unnecessary delay in effecting a permanent placement, and in maintaining birth sibling relationships.7 I refer to this as the ‘dual legacy’ that many children

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7 This is a “loaded” statement, implying that the permanently placed child may be separately placed from siblings, whether those siblings remain in the birth family or not. The rhetorical question is posed as it is my experience that such separation often occurs. This needs to be addressed by the Chief Executive.
in care have. The Chief Executive’s task must therefore take account of that dynamic. The child’s genetic inheritance and other pre-birth and early childhood experiences should also not be overlooked: for example, the child may have suffered from in-vitro ingestion of alcohol/drugs resulting in developmental delay or have attachment issues. This leads to the subsequent challenges and that flow from that. These regrettably, are inherently part of the abuse/neglect paradigm.

As a consequence, the responsibility of the State may extend beyond the time when the child is found a new home and the caregivers assume legal responsibility for that child. The involvement of the State may therefore be intensive and long-term, depending on the specific circumstances and identified needs of that child. The thesis examines the way in which the State, through the agency of the Chief Executive as the custodian-in-law, responds to the issues presented by these children.

The chapters that follow are informed by the work I do on as a barrister working in the Family Court and with a particular interest in the CYPF Act and, within that, the specific issue of permanency. The chapter concludes with an overview of my experience and interest in issues concerning children who are removed from their families and not returned to the care of their birth families.

Given the scope of the field, the thesis does not address related questions such as why the Chief Executive intervenes in the lives of families; or whether threshold levels relating to intervention are appropriate or not. Nor does it consider the formal legal relief that may be available for children who have been abused or mistreated when in the care of the State (or a child-care agency).

1.2 The research inquiry

The thesis identifies why and how the State, has responsibility for the children taken into its care. A number of subsidiary issues then arise which are also addressed. I outline how state authorities over many centuries, firstly in England and, much later New Zealand, tackled the complexities of children’s lives who were perceived as deprived, indigent, criminal,

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neglected and or abused. This thesis involves consideration of the definition and ambit of the expressions ‘care’, the ‘state’ and ‘responsibility’. Chapter Two commences by noting the relevant statistics relating to children who are in care. It discusses what I mean by ‘care’ the ‘State’ and ‘permanency’, as each has a variety of meanings that may attach to them. The more complex issue of ‘responsibility’ is the subject of chapter four. The role of the State involves a ‘whole of government’ response to the issues posed for children who cannot be returned to their families. Inherent within this are the dual legacies, that children in care may possess, reflecting on the one hand the consequences of the abuse and neglect that led to their coming into care and, on the other, their having experienced further abuse or neglect and/or drift in care.

In order to provide an overarching context to the thematic discussion, I have written two case studies set out in Chapter Three that illustrate quite typical scenarios that arise for children in who are in the care of the Chief Executive and who will not be returned to birth families. The first describes the history of a young girl who has experienced abuse and neglect and who has been placed by the Chief Executive in a new permanent non-kin family. It details both the social work and legal processes involved. The second looks at a young person on the cusp of turning 17 years of age, being the age when a final custody order under the Act discharges through operation of law. This, too, details the social work and legal processes that have been followed. Both case studies are referred to throughout the thesis in order to help highlight the various tensions that can arise in cases of permanency.

Defining what ‘responsibility’ is of fundamental importance and Chapter Four is solely devoted to it. This is a pivotal chapter. The core question addressed is what ‘responsibility’ means in the context of the State and for the care of children who are in the custody of the Chief Executive. This is initially discussed firstly, in light of its dictionary definition in order to consider the presence of any congruence between the theoretical discussion and the more general public understanding of responsibility that applies. That theoretical exposition is

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9 The focus is of course on New Zealand and the situation as it exists here. There is a direct historical political and legal connection between New Zealand and England.

10 Section 108(c), referring to the events which give rise to a s 101 order ceasing to have effect. Other grounds are when the terms of the order expire (presumably on the occurrence of a particular contingency), if it also a s 102 order (which have a life expectancy of six months), on the child being adopted or on the occasion of the marriage or entering into a civil union.
discussed within the context of the classification of ‘responsibility’ proposed by Hart\(^{11}\) and later elaborated on by Cane\(^{12}\) and Eekelaar.\(^{13}\) The chapter then considers how responsibility vis-à-vis the Chief Executive can be defined using the analysis proffered by Hart. This looks at both the statutory framework and at case law. It concludes by considering responsibility and the Chief Executive in relation to private law under COCA.

Chapter Five examines the historical role of the State, both in the protection of children and in the provision of care for them. The trends over time are important in understanding where we, in the 21\(^{\text{st}}\) century, have reached in respect of children in the care of the State. There is a continuum of state involvement that can be traced from the development of the *parens patriae* and wardship jurisdictions and the development of the Court of Chancery. These are the very early embodiments of state intervention in children’s lives. Effectively fused as one jurisdiction today, they represent the beginning of the State’s involvement with the welfare of children, and are historical antecedents to the statutory regime represented today by the Act. The second historical overview in this chapter considers how issues for children were addressed by the Poor Law, representing a quite specific manifestation of state concern for the poor and the indigent.\(^{14}\) They constituted a specific local, and ultimately national, response to poor and deprived adults and children. The Poor Law was not translated to New Zealand with the onset of colonisation, but was nonetheless present in a hybrid form, reflecting the straightened economic circumstances of New Zealand in the 19\(^{\text{th}}\) century.

A separate development, the statutory initiatives of the 19\(^{\text{th}}\) and early 20\(^{\text{th}}\) centuries is then discussed. These reflected, at least in part, the philosophical and intellectual impetus of the Victorian reform movements - the evangelical, educational and social initiatives that were present – and which had a profound effect on how society viewed children. These had their direct antecedents in the reaction of the enlightened state to the rigours of industrialisation and of colonisation.\(^{15}\)

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\(^{14}\) The Poor Law was in place in England for over 400 years and only repealed in 1949.
\(^{15}\) One aspect, the child as a vulnerable being and in need of protection, was ultimately encapsulated within the precept of “welfarism”. This is discussed in Chapter Five.
Chapter Six is the second significant component of the thesis, being the analysis of the relevant statutory framework for the permanent care of children. This looks at the Act and COCA together with related case law that prescribe the responsibilities the State has to children who are in its care and who will either be permanently placed or who will age out of care. The chapter commences by reviewing the historical antecedents of the Act, and the legal, social and political context in New Zealand that culminated in the novel approach to the care and protection of children in that Act. This occurred when there was a confluence between the economics of the new right, which were at the forefront of the public policy debate about the State’s appropriate role in society, and the impetus brought about by the renaissance in Māori thinking as exemplified in the 1986 report Puao te-Ata-tu. Both had a profound influence on the statutory and public policy environment that resulted.

However, the specific focus of the chapter, firstly, is with s 104(1)(a) of the Act which identifies the effect of a custody order and shows the direct nexus with a parenting order under COCA. It is my premise that the statutory framework leads to the conclusion that the duties owed by the Chief Executive are precisely those owed by the parents of child to that child. Section 104(1)(a) is very clear and the meaning to be given to it is quite consistent with the Act’s purpose, its objects and principles, and provides a straightforward basis for the exercise of statutory powers and the carrying out of statutory duties. This occurs in conjunction with the appointment of the Chief Executive as a guardian, with the chapter including a discussion on this. The second emphasis of this chapter is on the nomenclature used in the Act in respect of the custody of children and how this differs from COCA. I argue that the differences in use of words – between a ‘custody order’ in the Act – and how COCA uses the expression of a ‘parenting order’ for day-to-day care was deliberate. It is my view that Parliament’s intention was to ensure that the Act continued to provide the Chief Executive with powers for both caring for and containing children given the purpose of the

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16 See Chapter Six.
17 The public and parliamentary debate in respect of the CYPF Act took place largely after 1984. The parliamentary election of that year saw the third (the David Lange led) Labour Government elected and with it the profound re-structuring colloquially known as “Rogernomics” after Roger Douglas, the Minister of Finance. The clock has never been turned back. For a good general summary of the events in question and the subsequent political, social and economic changes that occurred see Michael King The Penguin History of New Zealand (Penguin Books, Auckland, 2003).
Act in covering both the care and protection of children and the issue of criminal offending by children.

Underlying the overall discussion is the public policy environment surrounding the Act discussed in Chapter Seven together with certain subsidiary themes that operate. This necessitates an understanding of what public policy is and how the Act can be placed within a specific theoretical discourse. I argue that New Zealand has no articulated or coherent general family law policy framework in the first instance and then consider the Act (within the specific context of the permanent care of children) in terms of the four value classifications and analysis outlined by Fox Harding in *Perspectives in Child Care Policy*.\(^{19}\) Within the narrower ambit of this thesis there is, nonetheless, the Home for Life policy relating to the permanent placement of children operating once it is clear that this social work goal has been endorsed by the Family Court. This is the permanency policy that was initially promulgated in 2006 and which has, since 2010 been encompassed in the ‘Home for Life’ policy. The United Nations Convention on the Rights of the Child (‘UNCROC’) has also been a major influence in public policy since its ratification by the New Zealand government in 1993. The Articles that are relevant to the question of the permanent placement of children are identified, with particular regard to how the voice of the child is heard in permanency cases.

The situation of Māori children who are removed from their families and permanently placed is canvassed in Chapter Eight. Māori occupy a quite specific place in New Zealand and have a unique perspective on the value of families and children. My analysis is set within the tripartite paradigms of colonisation, of government policies promoting assimilation and the subsequent rejuvenation of Māori thinking that occurred in the latter quarter of the 20\(^{th}\) century. Careful consideration needs to be given to this issue because the numbers of Māori children in care are well above the proportion of Māori in the New Zealand population. The particular significance of *Puao te-Ata-tu* and the changes it wrought to the amending legislation that became the CYPF Act are considered. Importantly, given the significance of children to Māori, the implications of the process and methodology of permanency are considered. Recent case law has identified the significance of cultural connections for Māori

\(^{19}\) Lorraine Fox Harding *Perspectives of Child Care Policy* (Pearson Education Limited, Essex, 2003).
children and the implications of this for those Māori children taken into the care of the State. These decisions pay regard to the emphasis the Act gives to children having, and being able, to maintain relationships with their families of origin. This may represent the beginning of an emphasis on ensuring that culturally appropriate placements are made for children in foster-care, both in the first instance and later on should the child not be returned. However, the Māori perspective can come into conflict with the dominant official paradigm – the attachment theory driven permanency policy of the Chief Executive.\(^{20}\)

The great majority of children who come into the care of the State have suffered significant abuse or neglect and may ensure similar experiences when in the care of the Chief Executive. Chapter Nine considers these dynamics. The first challenge for the Chief Executive is either securing a new family where the child will be physically and emotionally secure or effecting a care placement that will maintain until his or her discharge from care. The second challenge is in identifying whether the COCA legal framework which is currently used to effect the permanent placement of children is effective in achieving a stable and secure placement or, alternatively, whether adoption is a vehicle that can be utilised. When a child is permanently placed and the caregivers seek to have the placement confirmed by orders from the Family Court, the orthodox path is to have the CYPF Act orders discharged and substituted by orders under COCA for day-to-day care and for guardianship. I consider that COCA orders can provide the desired security and stability of placement, as in practice, once the order for day-to-day care is made then it is highly unlikely there will be any subsequent challenge to the placement by the birth parents.\(^{21}\) However, the issue of guardianship and the obligations that flow from the new caregivers having the same status in law as guardians of the child as the birth parents can be significantly problematic. The COCA framework is conceptually quite deficient.

Specific policy drivers are identified in Chapter Ten. These are not necessarily discrete in their operation or influence. Firstly, there is the immediate historical context to the passing

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\(^{20}\) The concept of attachment underpins the permanency paradigm. This is discussed in detail in Chapter Eleven.

\(^{21}\) I am aware of only one instance where there has been subsequent litigation by a birth mother after COCA orders have been made. (There may be others). This is the litigation involving the cases C v T HC Nelson CIV 2008-442-202, 10 December 2008; C v LT, ST, EC and AC and Ministry of Social Development [2009] NZCA 140; C v T [2009] NZFLR 385; C v T [2009] NZFLR 1098; LC v LMT FC Nelson FAM 2007-042-492, 15 April 2010; LC v LMT FC Nelson FAM 2007-042-492, 17 June 2010; LC v LMT FC Nelson FAM 2007-042-492, 15 October 2010; LC v LMT [2011] NZFLR 203. (I am grateful to Nicola Grimes for bringing these to my attention. They are further discussed in Chapter 9.8.)
of the Act, the dynamic already noted of the convergence between the economics of the new right, and the Māori revival. Secondly, there have been several inquiries into deaths/injuries of children who have either been in the care of the Chief Executive.\textsuperscript{22} Thirdly, MSD is an agency of the State and as such operates within the confines of governmental policy in terms of policy outcomes and the financial constraints that apply at a given time.\textsuperscript{23}

Chapter Eleven discusses permanency by identifying what it is, how it came about, and why it is important for children who are removed from their families. Permanency planning and permanency outcomes are discussed within the New Zealand context. An important question considered is whether or not orders under COCA must be taken by caregivers in order for permanency to truly occur. I argue that the Chief Executive places too much emphasis on this, with there being inadequate focus on the individual and discrete circumstances of the specific child. My concern is that in any individual case, due regard may not be given to the fact of subjective permanency being in place – and the family and the child believing the placement to be permanent - is sufficient. The chapter then continues with a discussion derived from the case studies, of how the legal frameworks under both the Act and COCA are applicable for Shanaia and to Zeppelin (during his transition from care).

When a child is placed in a new family, the issue of what support framework is required to secure and sustain both the child and family arises. This is significant in the overall scheme of a child being permanently placed. I consider the Home for Life policy and identify significant issues inherent within it in delivering services to permanently placed children. There is often in practice considerable tension between caregivers and the Chief Executive insofar as the extent and nature of the post-permanency supports that a child may require together with how those supports are best delivered. I review the small, but significant, body of case law informing this debate. The third challenge lies in the provision of supports to the permanently placed child and to the new family. Chapter Twelve explores these dynamics, noting the tensions present between the requirements of the law and the policy imperatives that apply.

\textsuperscript{22} Or where the Chief Executive has had a formal monitoring role or has returned the children to the care of birth parents

\textsuperscript{23} This is notwithstanding that care and protection is a demand driven activity and the passing of a law or the promulgation of a particular policy will not in itself prevent a child from being abused and later having to be permanently placed.
Chapter Thirteen discusses responsibility within the contexts of the legal framework and permanency. It proposes specific reforms that I consider will address the situation for those children in the care of the Chief Executive.

The need for Chapter Fourteen arose from the introduction into Parliament of the Vulnerable Children Act in August 2013. If enacted as introduced it will make significant concerning changes to the CYPF Act in respect of the legal framework that may apply in some instances of permanent placement and in respect of post-permanency supports. The chapter critically analyses those aspects of the Bill.

Chapter Fifteen is the concluding chapter. It brings together the themes discussed in the thesis and sets out my conclusions about the responsibility of the Chief Executive to children in his care.

1.3 The social contract

The fundamental submission of the thesis is that the Chief Executive has a clear and quite specific responsibility to the children who are either in care and are not being returned to the care of their parents or who have been in care and have been permanently placed in new families. This responsibility is founded directly on the effect of the making of a s101 custody order in favour of the Chief Executive, and with the Chief Executive being appointed as a guardian of the child. It is both present and prospective in its character; enduring into the future by virtue of the Chief Executive, following intervention, having determined that a particular permanent placement best meets the welfare and best interests of the child and, then expecting that the family will care and nurture the child through to independence. Those caregivers will assume legal responsibility for that child. They will be the people who will have to deal with the subsequent behavioural, emotional and psychological manifestations of the care and protection and care histories. That family has assumed a responsibility on behalf of society as a whole, taking into their home an abused and neglected child who cannot be raised by his own family. But for their actions in so doing, the State would have to find some other way of caring for that child. The responsibility of the State, therefore, is to take all necessary and appropriate steps to ensure that the placement succeed and the child successfully leaves both care and childhood/adolescence and is able to embark on a productive adulthood.

This obligation can be characterised as a ‘social contract’. This is not a social contract in its most formal sense of it being an agreement/compact between the people and government
whereby rulers agree to rule justly and the people agree to obey.\textsuperscript{24} A more apt definition in the care and protection context is that a social contract is an implicit agreement among members of a society to co-operate for a specific social benefit.\textsuperscript{25} My argument is that a social contract exists between the State with firstly, the children who have been the subject of intervention and will not be returned home and, secondly, where those children have been permanently placed, with their caregivers. This specific thesis has not been previously articulated within New Zealand and internationally. It may be illustrated by distinguishing between the concepts of ‘child protection’ and ‘child welfare’. The former focuses on safety and provides the basis for intervention by the Chief Executive. The latter embraces the task of the Chief Executive having intervened and determined the child must be permanently placed. It embraces:\textsuperscript{26}

\ldots the broader notion of child well-being and references health, cognitive functioning and emotional well-being as well as life outcomes such as lifelong social connections, employment, social assistance and criminal history.

Once a child is in the care of the Chief Executive both must be attended to and with the latter dynamic being as much to the forefront as the former had been, given the decision to permanently place the child.

The existence of a social contract is quite consistent with the concept of ‘partnership’ that is inherent within the Act;\textsuperscript{27} and is it is congruent with New Zealand’s international obligations

\textsuperscript{24} There is a range of literature discussing this most complex of subjects. It is well beyond the scope of this thesis to embark on any analysis of it. The reference noted in this footnote will take readers to the necessary and essential authorities. George Thomas Kurian (ed) \textit{The Encyclopedia of Political Science: Volume 5} (CQ Press, Washington DC, 2011) at 1548-1549.

\textsuperscript{25} Judy Pearsall (ed) \textit{New Oxford Dictionary of English} (Clarendon Press, Oxford 1998) at 1767. In New Zealand the most obvious and well known instance is the Accident Compensation Scheme introduced in 1972. This saw the abolition of the common law right to sue for personal injury arising from an accident in exchange for universal no-fault cover when personal injury by accident occurred.

\textsuperscript{26} Fred Wulczyn “Long Term Outcomes of Foster Care: Lessons from Swedish National Cohort Studies” in Elizabeth Fernandex and Richard P Barth (eds) \textit{How Does Foster Care Work? International Evidence on Outcomes} (Jessica Kingsley Publishers, Sweden, 2010) at 222. Wulczyn observes that the issue of child well-being “is …an emerging theme in in policy and practice debates in the child welfare field”, at 222.

\textsuperscript{27} And as exemplified in particular with the concept of the family group conference which lies at the heart of the Act. (The resolution of care and protection issues for children should be resolved by families in the first instance with the assistance of CYPF, but with formal intervention being a matter of last resort, congruent with the principle of minimum intervention in s 13(b)(ii) of the Act.)
under the UNCROC. In a case in the area of disability law under the Human Rights Act 1993, the State has accepted that there is a social contract between families and the state under which the family is recognised as the fundamental social unit in our society. The state supports families and the role of families in society. Families contribute to the social good by providing care and support to those within the family unit.

However, in that case the Tribunal observed that “if a social contract in some way or another can be identified, we are a long way short of being able to specify the actual ingredients of a social contract in New Zealand.” Irrespective of whether a ‘social contract’ exists in respect of the permanently placed child (and the child in care of the Chief Executive), it remains my case that there is an essential responsibility on the part of the State which, if achieved, will enable the placement is sustained so that the child is able to enter adulthood “as maximally self-sufficient adults” as best prepared as possible given their care and protection and care legacies. It is my conclusion that this goal has not been reached.

1.4 My experience and its relevance to this thesis

For the past 26 years I have worked as a lawyer practicing in the New Zealand Family Court and specialising in issues relating to children. I have a particular interest in proceedings under the Act. I am regularly appointed by the Family Court to represent children who are the subject of CYPF and COCA proceedings. I also represent the parents facing the loss of their children through state intervention or who may have already lost their children. I represent new caregivers who have taken on responsibility for the care of children. I regularly

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28 The Convention is specifically discussed at Chapter Seven.
29 Submissions of the Crown to Human Rights Review Tribunal in A & others v Ministry of Health (HRRT 33/2005). It should be noted that the proposition that there was a social contract went to the argument that its presence provided justification for not paying the parents of disabled children to look after their children. Consistent with that social contract, the State provides a range of supports for disability services. However, there are policy reasons why that support may be directed into particular areas and not others or otherwise limited. See also Chapter Seven which discusses public policy.
30 A & others v Ministry of Health (HRRT 33/2005, 8 June 2010) at [177].
32 This was more explicitly recognised in England where in 2003, the Minister for Children observed that the responsibility of local authorities for children in care was broader than that of a natural parent in that it covered the collective responsibility across services and across councils to safeguard and promote the life chances of looked-after children”. Margaret Hodge, Minister for Children, in Forward to Department for Education and Skills, If this were my child (2003), cited by Judith Masson “The State as Parent: The Reluctant Parent? The Problems of Parents of Last Resort” (2008) 35(1) Journal of Law and Society 52.
represent parents in COCA proceedings. I am sometimes also appointed to assist the Family Court as amicus in proceedings under both the Act and COCA.

During the 1990s I was a member of a number of standing committees relating to family law of the then Auckland District Law Society. Following the 1999 creation of the Family Law Section of the New Zealand Law Society I became a member of its Children, Young Persons and Their Families Act Standing Committee. I was the convener of that standing committee from 2004 – 2008 and 2009 – 2011. I have been a member of the Executive of the Family Law Section since 2011 and in April 2014 was elected Chair of the Section.

After a number of years of practice I considered that I was missing a significant theoretical component when it came to working in the child protection and child care fields. In 2005 I therefore enrolled in the University of Otago Postgraduate Diploma in Child Advocacy course and completed this in 2008. My research paper was “Contact issues for children who have been permanently placed out of their birth families: An examination of relevant literature and case law.” Two publications resulted from that study. I also presented two conference papers considering the impact of the CYFS permanency policy for children in care, firstly to the New Zealand Family Law Conference 2009 and, secondly, to the Family Court Judges’ Conference 2010. A further paper was published in the New Zealand Family Law Journal addressing the issue of young people who have attained the age of 17 years, but require continuing assistance from the State due to their cognitive impairment. In 2011 I presented a paper at the 2011 ‘Grandparents Raising Grandchildren Conference’ that addressed issues arising from intervention of the Chief Executive and the permanent placement of grandchildren with grandparents by the Chief Executive with a focus on the

33 Allan Cooke “Contact Issues for Children Who Have Been Permanently Placed Out of Their Birth Families: An Examination of Relevant Literature and Case Law” (Postgraduate Diploma in Child Advocacy, University of Otago, 2008).
34 Allan Cooke “Permanency for Children: Why Permanently Placed Children Need On-Going Support, and How to Deliver that Support” [2008] NZFLJ 37;
36 Allan Cooke “Permanency Issues: Thoughts of a Family Court Lawyer” (paper presented to Family Court Judge’s Conference, Auckland and Wellington, 2010).
nature of the intervention and the provision of support. More recently I have written a chapter for a new publication, the Routledge Handbook of Family Law and Policy,\(^{39}\) examining policy challenges regarding child welfare, child protection and adoption within a New Zealand framework. Lastly, I wrote a paper for the New Zealand Family Law Conference 2013 on the role of lawyer appointed to represent children in the context of the pending reforms to the Family Court and COCA.\(^{40}\)

Through my professional practice and academic study I have become acutely aware of the challenges that are faced by not only children who are in the permanent care of the State but also those children who can be characterised as being ‘vulnerable’ and who are the subject of the current Vulnerable Children Bill recently introduced into Parliament.\(^{41}\) These are children who are significantly disadvantaged and largely voiceless. The State itself faces huge challenges in providing quality care for these children. Integral to this is the key dynamic of the provision of supports, both legal and therapeutic, to the new families of these children, with the latter dynamic requiring a prospective whole of government response. It has been part of my day-to-day practice to ensure that my child clients are afforded every opportunity in this respect. I am committed to ensuring that the State fulfils its obligations to this most vulnerable group of children and those who care for them. My day-to-day work is informed by my understanding of the legal and social work issues that are present.

In writing this thesis, the material relied upon to substantiate my position comes not only from the relevant statute law, the cases and published literature, but also from my own experience of many years practising in this field. I refer to a number of cases, including those in which I have been involved, to illustrate key themes. I believe this thesis will constructively assist the policy debate in respect of the many issues that are presented for children in care and help achieve good outcomes for them. A more transparent discussion is needed about firstly, the consequences of making a custody order under the Act and how this creates a legal obligation to care and nurture the child as required of any parent of a child, secondly, the most appropriate legal framework required to effect permanency for these

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\(^{41}\) I have been heavily involved in the preparation of the New Zealand Law Society’s submissions on that Bill and co-presented the submissions of the Law Society to the Social Services Select Committee.
children, and thirdly, the provision of supports for them once they are placed in new families or are being transitioned from care. This can only assist in identifying the true nature of the responsibility that the State has to these children.

Chapter Two considers the statutory inquiry that occurs when children are the subject of intervention by the Chief Executive. This includes consideration of the notion of the ‘state’ in relation to the out-of-home care of abused/neglected children and occurs within the context of the statistics relating to children in care.


CHAPTER TWO

The Statutory Inquiry, Care, Permanency, the ‘State’ and the Goal of Intervention

2.1 Introduction
This chapter outlines how children are removed from the care of their birth families through the exercise of statutory powers conferred by the Act. It firstly notes the statistics relating to children in care, primarily as at 30 June 2012. It then explores what is meant by ‘care’, the ‘State’, and permanent placement and observes that the response of the State to the issues posed for children in care must be that of a unified total government response and not confined to CYFS given the broader issues that are involved for this category of children. The chapter concludes by asking ‘what is the goal of intervention?’

2.2 The statutory inquiry
The removal of a child from the care of his or her parents occurs under the authority of Parliament, and the laws enacted by it. This is through the operation of the Act. Children who are removed from their families and placed into new ones have a status under the Act, being in the custody of the Chief Executive as a consequence of an order of the Family Court. The first issue therefore is to identify in law the duties and obligations that accompany the custodial power conferred on the Chief Executive or, in other words, what is the legal and moral responsibility of the State towards those children who are placed in its care, where it is intended that they will not return home to their birth families? The consequence of a child having a custodial status necessitates a careful analysis of the applicable public and private law – the Act and COCA. This dual analysis is required because of the nexus that exists between the two statutes. The effect of an order for custody being made under the Act is as if a parenting order had been made under COCA.42 What does this mean for the role of the State? Does it deem the Chief Executive to be the parent of the child in question, with precisely the same duties and obligations towards that child as the natural parent of that child? Or does this mean that the Chief Executive has different (and/or additional) duties and obligations that arise because of the interfamilial harm that has been suffered by the child?

42 Section 104(1)(a).
Finally, does the Chief Executive have a continuing responsibility for the child once he or she has been placed and the new caregivers have taken orders under COCA?

2.3 Numbers of children in care

The inquiry takes place in the context of those children who are in the custody of the Chief Executive. It is necessary to have some comprehension of the numbers of children involved. Children in the care of the Chief Executive range in age from new-borns\(^{43}\) to teenagers. As at 30 September 2013, there were 3,906 children and young persons in the care of the Chief Executive under the care and protection provisions of the Act who were in out-of-home placements.\(^{44}\) Fewer than 15 per cent \(^{45}\) of them will be returned home to their families.\(^{46}\) The remaining children will have to be found alternative caregivers\(^{47}\) and where they are placed will depend on a number of circumstances: for example, if custodial status has just been obtained then a placement in a Department of Child, Youth and Family Services (‘CYFS’) family home or with a NGO might be necessary – in the absence of a safe kin-placement. If the child is Māori, then attempts would be made to find a placement with Māori caregivers; where the child is to be permanently placed, the placement may be with a caregiver approved for the purpose – this could be an existing CYFS or NGO caregiver or someone who has specifically applied to be a permanent caregiver. Table One shows the

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\[^{43}\] For example, as at 30 June 2010 166 babies (aged less than 30 days) and 502 children under the age of two years entered into State care. See Paula Bennett, *Why You Should Care: Your Care Matters: a plan for children in care* Wellington, 2020, at 12. This is the policy document that introduced the ‘Home for Life’ permanency policy. See also Table Two below.

\[^{44}\] CYFS Practice Centre *Children in care and foster carers – Child, Youth and Family.* [http://www.cyf.govt.nz/about=us/who-we-are-what=we-do/kids-in-care.html]. As at 31 December 2012 the figure was 3,783.

\[^{45}\] I have assumed that the percentage of children who will not be returned remains the same, notwithstanding the change in numbers of children in care between 30 June 2008 and 30 June 2011. Ian Sinclair “What Makes for Effective Foster Care” in Elizabeth Fernandez and Richard P Bath (eds), above n 26, observes that although many children come into care in the course of a year, “[T]hose who do not leave within six months are very unlikely to go home or otherwise leave the system in the near future unless they are very children, who may wait for a while before adoption” at 191.

\[^{46}\] Figure cited by Ray Smith, then head of CYFS at a conference of Family Court Judges, Auckland and Wellington, 2010. These figures were subsequently confirmed to me by email on 15 April 2010 following request to office of the Chief Executive.

\[^{47}\] CYFS has “around 4000 caregivers.” Bennett, above at 15. To this should be added those caregivers who come under the umbrella of other organisations such as Barnardos of New Zealand and the Open Home Foundation, which are approved under the Act as Child and Family support Services.
number of New Zealand children in out-of-home care by placement type as at 30 June for the years 2007 to 2012.  

Table One:

Numbers of New Zealand Children in Out-of-Home Placements and the Type of Placement

<table>
<thead>
<tr>
<th>Placement type</th>
<th>Number of children and young people in out-of-home placements¹</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2007</td>
</tr>
<tr>
<td>Child and Family Support Services</td>
<td>703</td>
</tr>
<tr>
<td>CYFS caregiver placement</td>
<td>1,824</td>
</tr>
<tr>
<td>CYFS residential placement</td>
<td>57</td>
</tr>
<tr>
<td>CYFS family home placement</td>
<td>218</td>
</tr>
<tr>
<td>Family/whānau placement</td>
<td>2,164</td>
</tr>
<tr>
<td>Others⁵¹</td>
<td>78</td>
</tr>
<tr>
<td>Total</td>
<td>5,044</td>
</tr>
</tbody>
</table>

¹ From statistics provided to me by Tania Williams, Barrister of Hamilton from information provided to her by the Chief Executive of CYPF in July and August 2013. However, figures were not given for each category of placement when the number of children was under 5. Thus in any given year the actual number of children in care will be slightly larger than the figure cited. The 2013 figures are from the CYPF site, see note 44 above.

⁵¹ This included boarding or other supervised accommodation.
Table one shows that during 2007 to 2012 of the children in out-of-home placements between 41 per cent and 44 per cent were in kin-placements, between 34 and 36 per cent were in CYFS family homes or with CYFS caregivers and 14 per cent were with NGO caregivers.\textsuperscript{52}

Pertinent as well is the age of the cohorts of children who are in care – as seen in Table Two:\textsuperscript{53}

\begin{center}
Table Two:
\end{center}

\begin{center}
The Ages of New Zealand Children in Care
\end{center}

<table>
<thead>
<tr>
<th>Age of child or young person at the end of June 2007 to 2011</th>
<th>Number of children and young people in out-of-home placements</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2007</td>
</tr>
<tr>
<td>0–1 year</td>
<td>449</td>
</tr>
<tr>
<td>2–4 years</td>
<td>747</td>
</tr>
<tr>
<td>5–9 years</td>
<td>1,370</td>
</tr>
<tr>
<td>10–13 years</td>
<td>1,248</td>
</tr>
<tr>
<td>14–17 years</td>
<td>1,202</td>
</tr>
<tr>
<td>18 years or over</td>
<td>28</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>5,044</strong></td>
</tr>
</tbody>
</table>

\textsuperscript{52} Statistical Report 2011, above n 48. See also Nicola Atwool \textit{Children in Care: A Report into the Quality of Services Provided to Children in Care} (Office of the Children’s Commissioner, September 2010).

\textsuperscript{53} Statistical Report 2011, above n 48. Tania Williams has provided me with more current figures, given to her by the Chief Executive. These are as at 30 June 2012. These relate to ethnicities of children in care (Asian, European, Māori, NZ Pākehā, Other and Pacific.) The figures are not precise as where the figure in any given instance is less than 5, that statistic has been redacted. I have therefore placed in square brackets the number of additional children who might be caught in each of the age groups having regard to the redactions. The breakdown of ages is also slightly different: 0-1 year -400 [8]; 2-4 years: 616 [12]; 5 to 9-994 [8]; 10 to 13-998; 14 to 16-834; 17 years or older-17 [12].
Of the children in out-of-home placements in the years 2007 to 2011, between 54 and 53 per cent were aged between 5 and 13 years and between 23 and 26 per cent were under the age of 5 years.\textsuperscript{54}

2.4 What is care?

The concept of ‘care’, as I use it in this thesis needs to be clearly articulated from the outset. It encapsulates three dimensions: firstly, the State obtaining a legal status over a child, to the exclusion, for the time being of that child’s other legal custodians and/or guardians;\textsuperscript{55} secondly, the actual placing of that child in alternative care\textsuperscript{56} pending his or her return home or permanent placement in a new family and, thirdly, the question of how the child is actually cared for when placed into care, that is, the provision of parenting to that child by the State, through its human agents. (The context in which ‘care’ is used will make its particular meaning clear.)

2.5 The nature of care placements

As Bennett has observed that the way in which care is provided to a child who is not your own has undergone significant change.\textsuperscript{57} Going back 40 years, many of the children who required alternative care were adopted. Griffiths notes that in 1970, a total 3,837 children were adopted.\textsuperscript{58} This is no longer the case. In the year ended 30 June 2013, only 195 adoptions were registered in New Zealand.\textsuperscript{59} As at 30 June 2013, CYFS wrote 154 adoption reports for the Family Court. Of these, most involved family adoptions (for example, step-
parents adopting).\textsuperscript{60} In contrast, as at 30 June 2010, 389 children were the subjects of orders that saw their caregivers obtain parenting orders for day-to-day care and guardianship under COCA – described by CYFS as their obtaining a “home for life.”\textsuperscript{61}

2.6 Permanency/permanent placement

A fundamental aspect of the State’s care of children is to find them new homes with caregivers who will assume the role of parents, and (ideally) provide them with loving and nurturing homes that will endure into adulthood. The expressions ‘permanency’ and ‘permanent placement’ refer to this process.\textsuperscript{62} However, certain questions arise in respect of the policy of the Chief Executive in the implementation of permanency for children. (This is the Home for Life policy, introduced in 2010.) For example, is it sufficient for a permanent placement to be established for a child, but for the legal framework to remain under the CYPF Act, with the Chief Executive retaining custodial and/or guardianship status? Does a ‘permanent placement’ always entail the new caregivers of the child obtaining orders under COCA? In this latter event, to what extent should the Chief Executive remain involved in ensuring the successful transition of the child into the new family, and in ensuring the child’s care and protection and care legacies are addressed through the provision of necessary post-permanency supports?

As exemplified by that policy, current practice contemplates COCA orders being taken by caregivers as a necessary element for achieving a permanent placement.\textsuperscript{63} However, it can also be cogently argued that permanency is primarily a state of mind, and what is more important is the relationship between child and caregiver. If the caregiver’s intention is to provide a permanent home for the child and the child knows this, is that sufficient, with

\textsuperscript{60} http://www.cyf.govt.nz/about=us/who-we-are-what=we-doadoptins-data-back-up.html, d/l 9 December 2013, for the 2013 statistics. There was 1 foster parent report written in the year ending 30 June 2013. There were 50 reports written for each of non-relatives domestic adoption and relatives domestic adoption and 17 one parent and spouse adoptions. There was 1 foster parent report written in the year ending 30 June 2013. There were 50 reports written for each of non-relatives domestic adoption and relatives domestic adoption and 17 one parent and spouse adoptions.

\textsuperscript{61} Bennett, above n 43, at 16.

\textsuperscript{62} See Chapters Eleven – Twelve below.

\textsuperscript{63} Bennett. This was also the case under the previous policy announced in 2006, Child Youth & Family Services Children in Care: A User’s Guide to the Permanency Policy (Ministry of Social Development, 2006).
permanency then achieved and the need for COCA orders unnecessary? It is my view it can occur, depending on the situation for the specific child and her family.64

2.7 The State

This thesis is concerned with the ‘State’. This is a commonly used phrase yet, as Fox Harding65 observes, it is a concept incorporating a variety of diverse meanings, being:66

… a set of institutions/organisations (such as central government and local government departments, courts, the police and quasi-autonomous agencies set up and funded by government) with other institutions – such as the professions – closely linked to it, each body having its own rules, policies and practices which are not necessarily consonant with each other, and do not necessarily reflect one ideology, aim or set of interests.

In a more particular and jurisprudential sense, the State embodies the executive branch of government, and can be used interchangeably in that respect with the ‘Crown’. In describing the Crown, in the sense of it being something other than the person for the time being the particular royal personage designated as King or Queen, Joseph draws on Town Investments Ltd v Dept. of the Environment where the Crown, in its most literal sense, was described as that “piece of jewelled headgear under guard in the Tower of London.”67 Rather, “the Crown is the State, personifying its national culture, history, and continuity.”68 In its strict legal sense it means:69

64 This aspect of the discussion arises from the insistence of social workers that in order to achieve permanency for a child, orders under the CYPF Act must be discharged and substituted by COCA orders. Ordinarily that is an appropriate outcome but in some situations, not so. There is insufficient recognition of that dynamic.


66 At 12. See also Nick Frost Rethinking Children and Families: the Relationship Between Childhood, Families and the State (Continuum International Publishing Group, London and New York, 2011) at 5: “… the State is a complicated amalgam of local, regional and national structures which may coalesce into a coherent whole (such as the totalitarian State), or more usually form a diverse and sometimes contradictory whole (dispersed forms of government, such as devolution.”


68 Joseph, at 549. He then observes that British constitutional law has never recognized “the State” as a legal concept (at 550) but observes at n 13 that PW Hogg in Hogg, Monaghan and Wright Liability of the Crown (2nd ed, Law Book Co, Sydney, 1989) asserts to the contrary that “the State” is a legal person under British law. For my purpose, I need not pursue the debate.

...the Queen in her public capacity as the bearer of governmental rights, powers, privileges and liabilities in New Zealand. The Crown has the legal personality of an individual and is able to own property, to spend money, or to make contracts. The Crown is commonly called the executive branch of the New Zealand Government and maybe called the executive, the government, or the administration. However, lawyers usually use the term the Crown.

Joseph observes that the expression ‘the Crown’ may sometimes be used in a somewhat broad sense in reference to the functions of government and the public administration.”70 This description underpins my use of the ‘state’ in terms of how the task of caring for children who are in its care is addressed. At the operational level, this responsibility devolves to the government and to the roles ultimately played by CYFS (and the Chief Executive) in accordance with their statutory mandate. There is, accordingly, a focus on the Chief Executive, given that direct operational role. This is reinforced by the decision of the Supreme Court in Attorney-General v Chapman,71 which reaffirmed the presence “of a general compensatory remedy against the State (comprising the three branches of government) for deprivation of rights.”72 The majority explicitly rejected the notion

Sovereign, the Governor-General, the Executive, a Government Department and a particular public servant or other person exercising a public function, citing the Law Commission To Bind Their King in Chains (NZLC SP6, 2000) and recommends that there needs to be a standard definition of what constitutes the Crown set out in the Interpretation Act. This would apply when interpreting the term in other legislation. The New Zealand Law Society in its submission agreed that the definition was not always clear but that a full policy analysis was required before a final meaning was reached given the significant political and constitutional issues involved. Law Talk, 819, 24 May 2013, at 16.

70 Joseph, above n 67, at 556, (referring to Lord Morris in Town Investments Ltd v Dept of the Environment, above n 67, at 393).
71 Attorney-General v Chapman [2012] NZSC 110, [2012] NZLR 462. This case involved the discrete question of an alleged claim under the NZ Bill of Rights Act for damages in respect of a breach of that Act by the judiciary. The decision of the Court, by a majority, upheld the notion of personal judicial immunity. This was for pressing public policy reasons: the desirability of finality in litigation, the importance of judicial immunity, and the existence of effective remedies, rights of appeal, re-hearing and review.
72 Elias CJ, at paragraph [78]. The full discussion (for present purposes) is thus:

[78] ‘The Crown’ has different meanings according to context.- Throughout the judgments in Baigent there is reference both to ‘the Crown’ and ‘the State’ as the party liable for public law damages.- In my view, Baigent is properly seen as affirming a general compensatory remedy against the State (comprising the three branches of government) for deprivation of rights. Such approach is consistent with the text and scheme of the Bill of Rights Act itself. It is consistent with the White Paper which preceded the enactment of the Bill of Rights Act. And it is consistent with the judgments in Baigent and Auckland Unemployed Workers’ Rights Centre. It is also consistent with the treatment of the Crown in the Crown Proceedings Act, making the Attorney-General the appropriate defendant under s 14 of that Act. These points I now address.

[79] Following the enactment of the Crown Proceedings Act, it is a bold submission that there is no concept of the State in New Zealand law. The suggestion made in submissions on behalf of the Attorney-General that under the common law constitution of New Zealand that historical position cannot be overcome unless, as in the case of the Constitution of Trinidad and Tobago, there is a break with the Crown under a new constitutional order is hardly compatible with the terms of the Crown Proceedings Act or the New Zealand Bill of Rights Act.
advanced by the Solicitor-General “that there is no concept of the State in New Zealand
domestic law.” Elias CJ summarised the situation.

[92] In conclusion, under the New Zealand constitution, the State is the Crown. Although it may be common to use the short-hand ‘Crown’ to refer to the executive in some contexts (especially in the prosecution of serious offences), in the constitutional context in which both the Crown Proceedings Act and the New Zealand Bill of Rights Act operate, the term is correctly used of the State as a whole, embracing the three branches of government. Claims against the State for breach of its obligations under the New Zealand Bill of Rights Act are properly brought against the Attorney-General, as authorised by s 3(2)(c) of the Crown Proceedings Act.

2.8 Whole of government response

Nonetheless, I consider that a critical distinction between the role of the State and that of the Chief Executive is necessary. This is because intervention to protect abused children can be considered a responsibility or duty that is carried out on behalf of society as a whole – in the same way that other tasks are undertaken for the benefit of the greater good. The Chief Executive, as the agent of the State, is the vehicle by which the State performs this function.

The State therefore embraces a whole of government response to the issues that are presented by (and on behalf of) children who are placed in the custody of the Chief Executive on a permanent basis and who are to be found new families. This whole of government response covers not only the administrative arrangements pursued by CYFS and other government agencies (i.e. the Ministries of Health and Education and The Treasury) but also the legislation that provides the framework in which decisions are made for children who are at risk, are in care, and who have been found a new permanent home. However, the primary focus of this thesis remains the role of the Chief Executive, by virtue of being the designated agent of the State.

Under s 3 of the New Zealand Bill of Rights Act, “the Government of New Zealand” includes its “legislative, executive, and judicial branches.” As the language used in the judgments in Baigent indicates, the terms ‘State’ and “the Crown” are used as equivalent.

[80] As its long title provides, the Crown Proceedings Act was enacted “...to consolidate and amend the law relating to the civil liabilities and rights of the Crown and officers of the Crown, and to civil proceedings by and against the Crown.” [81] The Act applies to all civil proceedings as defined. It defines ‘the Crown’ to mean ‘Her Majesty in right of Ministers of the Crown Her Government in New Zealand.’ — ‘Officer’, in relation to the Crown, includes all servants of Her Majesty.

73 At [205] per McGrath, William Young and Gault JJ.
74 At [92].
2.9 The goal of this intervention

When the State intervenes and permanently removes children, a critical question to ask (and which follows the ‘why’ of intervention\textsuperscript{75}) is what is seen as the outcome of the intervention? This has changed over the years, reflecting the ways in which societies perceive children. In the 17\textsuperscript{th} and 18\textsuperscript{th} centuries there was a focus on ameliorating destitution and poverty so as to maintain social order and to ensure that the children of the poor became economic contributors. In the 19\textsuperscript{th} century concern arose for the moral-well-being and development of poor children. Running parallel throughout was a concern that the poor child was a threat, either potential or real, to law and order. The focus changed in the 20\textsuperscript{th} century to what was ostensibly good for the child in his or her best interests. In the latter part of that century this particularly can be seen within the paradigm of welfarism - of the way “power over others is exercised …it did not destroy existing institutions, but acted through them.”\textsuperscript{76} Within this was found the attempt to “link the fiscal, calculative and bureaucratic capacities of the apparatus of the State to the government of social life”\textsuperscript{77} which largely set the scene for the social and political policies that resulted in the Act.

However, behind the rhetoric still lies the concern of previous years.\textsuperscript{78} The goal for children who cannot be returned home to their birth parents is for them to be permanently integrated into new families where necessary attachments between the child and the caregivers are formed.\textsuperscript{79} Such a placement will ideally see these children being raised through to independence and into adulthood, maintaining lifelong relationships with members of that family and not being enduring lives of crime or social dislocation as adults. Further, and depending on the age of the child (and other pertinent circumstances), a family placement may not be possible, and alternative care arrangements will have to be made. Placement may therefore result in residential/institutional care or a foster placement, neither of which will provide the child with a permanent family home. Rather, these placements are intended to

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\textsuperscript{75} The ‘why’ is the abuse and neglect that the child has experienced.
\textsuperscript{76} Eekelaar, above n 13, at 11.
\textsuperscript{79} Noting that it is far easier to find new permanent homes for babies, infants and younger school-age children and that placing older children and adolescents may see the use of residential (or institutional) placements.
see the child transition from being in state care to independence, and often in the absence of familial support. I argue that state intervention benefits the child’s development by providing children with the stability in care that was lacking in their families of origin. This stability will enable them, once adults, to live independently and contribute to their communities. In order to achieve this, the State must also, where necessary, make every effort to remedy those care and protection and care legacies to help prevent them from repeating the intergenerational cycle of inadequate parenting.

2.10 Conclusion

Chapters One and Two have set the scene by firstly setting out the research and statutory inquiries that occur when a child needs to be removed from their birth family and noting both the operation of, and interaction between, the Act and COCA. Secondly, it has explained what is meant by the expressions ‘care’ and ‘state’ in the New Zealand context and has addressed the ultimate goal of any intervention that occurs. I argue that there has been a consistent historical process whereby the State has reacted to challenges in the social fabric and introduced legislative and administrative initiatives to remedy actual and perceived ills.

In the next chapter, which is also introductory in nature, I set out two case studies which are used to exemplify the themes of the thesis.

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CHAPTER THREE

CASE STUDIES

3.1 Introduction

Two case studies are set out in this chapter. The identified themes are pervasive and highlight the problems faced in addressing the legacies of both the abuse that results in children being taken into care and the specific care history when the child is in the care of the Chief Executive. These case studies will be drawn on in later chapters to help illustrate the matters under consideration.

The first concerns a child in the custody of the Chief Executive who has an extensive care and protection and care history and who has been permanently placed. The purpose is to examine what issues are presented for her given her dual legacy. The second is centred on a young person who also has an extensive care and protection and care history and is about to turn 17 years of age. Achieving that anniversary will end the Chief Executive’s custodial involvement. However, as the Chief Executive is an additional guardian, a duty of care will subsist such that consideration needs to be how this manifests itself in both a practical and legal sense.

The case studies are fictitious but represent real issues faced by children in care. The descriptions of Shanaia (the child) and Zeppelin (the young person) and the fact situations built around them, are an amalgam of the stories of children I have represented and of the cases I have been involved with as a lawyer in cases under the Act. The names – ‘Shanaia’ and ‘Zeppelin’ are fictional, as are the names and back-stories of their parents and caregivers. All references to places – hospitals and schools for example – are also fictitious. Nevertheless their stories and the issues they raise are indicative of cases that come before the Family Court.

81 Under s 110(2)(b) of the Act. This can last until the young person attains the age of 20 years. Experience suggests that the Chief Executive does not fully appreciate that having this status involves the exercise of a duty of care which must have practical manifestations. See Chapter 6.9.
3.2 Case study one: Shanaia

This case study is divided into three parts. The first is a narrative of the history from Shanaia’s perspective. The second is that same story but as seen from an ‘official’ viewpoint, written as an extract from a judgment that has been delivered by a judge of the Family Court. It reflects the matters set out in affidavits from the parties to the proceedings, from reports filed by social workers and from oral evidence given at the defended hearing. The third part of the case study continues the history from an objective external person.

3.2.1 Shanaia’s perspective

Shanaia thought she was nine years old when she first met Sarah and Braden. She was told about them by her social worker, Belinda. Belinda said that Braden and Sarah were to be her ‘forever’ family. Shanaia kind of understood that she was going to be living with Braden and Sarah all of the time. Shanaia knew she was now 11 years old. She had just had a birthday party with a cake and candles (she could count how many there were) – and presents - which was fun.

Shanaia had had a lot of people look after her and she had lived in lots of places. There had been her mother, Jolene and her dad, Jimi. Shanaia could not remember much about living with Jolene and Jimi; she knew that some kids lived with their mums (and sometimes their dad’s as well). Shanaia saw her mum sometimes. This was at the office where Belinda worked. Either Belinda or some other lady was also present. She was never left alone with Jolene. She did not see Jimi. She wondered where Jimi was and missed him.

Shanaia had been told that when she lived with her mum and Jimi she had been hit and had been taken to hospital. She could not remember being hit. She could remember Jolene and Jimi fighting and seeing mum being beaten up and the police coming to the home. Shanaia had been told that she was four years old when she had gone to hospital. She had had a broken arm and some other things – like a sore chest and a sore head. Shanaia had been in hospital for a long time. This was in another town. She had been back there for visits to see the doctors.

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A typical judgment will record the applications before the Court that require determination, may set out the history as described/asserted by the competing parties, make findings of fact as required and, if necessary, amend the narrative accordingly. The judgment will apply relevant legal principles and the final determination will be set out.

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After leaving hospital she went and lived with Whāea Hine and Uncle Steve. This was at the family home. There were lots of other kids there. She had also lived in houses where she was the only kid. Sometimes she had stayed with some people for a long time and sometimes she had stayed with them for only one or two sleeps. Shanaia also remembered going to stay with an aunty. She wasn’t nice. She had hit her. She was her mum’s sister or her cousin. One night as well, a man who she could not really remember but who came to see aunty, sometimes came into her bedroom when she was in bed and had touched her front bottom with his hand. It wasn’t nice. She thought it had happened once or twice but wasn’t sure.

Shanaia sometimes thought that Braden and Sarah liked her, but some of the time she was sure they didn’t. They would be like the others – and she would eventually get taken away by Belinda. Sometimes she got angry with them and would yell at them. Sometimes she would run down the hallway and smash into the door. She remembered as well that she had done poos in her bed and would wipe it on her hands and her sheet and blanket and the wall.

Shanaia went to Sunnyday Primary School. She had been there since she had lived with Sarah and Braden. It was about her fourth school. She kind of liked school, but it did make her angry, especially when she had to sit in class with all the other kids and just the teacher. Ms Winiata. She liked it better when the teacher aide was there. She was Carol. Carol came to school to see her each day but only in the morning till lunch time.

Shanaia kind of liked Belinda. She had been her social worker for a while, but she wasn’t the first one she had known. Shanaia had met lots of them, but couldn’t remember their names. She thought there had been some Māori social workers and a couple of Pākehā ones.

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83 ‘Whāea’ is Māori. It means a woman who is similar to an aunt. Whether the actual relationship is that of an aunt or not does not matter.

84 A “family home” is formally a ‘residence’ as defined in s 2 of the Act. It is a home in a local community which is used by the Chief Executive to house children who have come into care and not either been found foster placements with an individual caregiver or have returned home. The family home is run by a caregiver (usually a couple but not necessarily so). There could be as many as 6 – 8 children in the family home at any one time. These children will not be related and may remain in the family home from no more than a day or two through to a months and sometimes years.

85 “Pākehā” is the Maori term a “pale-skinned non-Polynesian immigrant or foreigner as distinct from a Maori; thence a non-Polynesian New Zealand-born New Zealander.” Harry W Orsman (ed) Oxford Dictionary of New Zealand English (Oxford University Press New Zealand, Auckland, 1997).
3.2.2 The formal history

This formal history is what the story of Shanaia might look like if it was recorded in a judgment of the Family Court.

“Shanaia’s mother is Jolene. She is now 29 years of age. Jolene is a Pākehā New Zealander. Shanaia is clearly part Māori, which is through her father. Jolene has had four other children; none of whom are in her care. Two of the children are younger than Shanaia and are placed informally with whānau. Another, born before Shanaia, is deceased. Jolene was 19 when Shanaia was born. The father of Shanaia is not formally known. However, it is thought that Jolene’s then boyfriend, Jimi is her father. Jimi is Māori. Jolene and Jimi were living together only after Shanaia was born. Jimi is not named on the birth certificate as her father.

However, since the birth of Shanaia and through to the time she was uplifted by the Chief Executive, Jimi had fulfilled the role of a father. This, however, has been on an intermittent basis as he has not been a constant presence in her life (or indeed of Jolene). Jimi comes and goes whenever he wants. Jimi is a member of Black Power. He has a raft of convictions - for violence and drug use.

At the time of Shanaia’s birth, a notification was made to the Chief Executive by staff at the maternity unit. This was in light of their concern about the Jolene’s demeanour at the birthing unit and her drug and alcohol ingestion during pregnancy; her pre-natal care/support had been marginal. There was concern for Shanaia that she might have been harmed in the womb as a result of her mother’s possible drug/alcohol ingestion.

The referral to the Chief Executive was made to the CYFS call centre and then forwarded to the local site office. Although marked urgent and to be addressed within the most pressing timeframe, it was overlooked. When it was finally picked up, there was delay in allocating a social worker to the case. This was due to staff shortages and case-work overload. The allocated social worker found Jolene and Shanaia when Shanaia was two months old. A report was prepared by the social worker and outlined that Shanaia had been seen by a

86 Black Power is a gang. It is notorious for its members being involved in drugs, prostitution, and various other illegal activities.

87 CYFS has a national call centre which receives all notifications made of alleged child abuse. On receipt of the referral, the call centre social worker will forward that the nearest site office to where the child lives. That office will carry out the investigation into the notification.
Wellchild\textsuperscript{88} nurse (advice from Jolene and not independently verified); that Shanaia was looking healthy and that there was a good attachment with her mother. There is no evidence as to the qualifications or the experience of that social worker to make an assessment about the quality of that attachment. The report recommended no further action.

Jolene, as a child, had been in the care of the Chief Executive as she had been physically, and probably sexually, abused by her step-father. He remains living with Jolene’s mother. Jolene has also been in trouble with the Police, both as a teenager and as an adult. She has convictions for assault and for possession of drugs (marijuana and methamphetamine). There is an extensive history of domestic violence callouts.\textsuperscript{89} The Police record these as involving both Jolene and Jimi. Both have been identified as the complainant and as the offender. These callouts occurred both before and after the birth of Shanaia. Shanaia has witnessed her mother being hit by Jimi.

Jolene left school at 15 years of age. She has no academic qualifications and has a reading age below her chronological age. Jolene drank when pregnant with Shanaia and is thought to have used methamphetamine during the pregnancy as well.

Shanaia again became involved with the Chief Executive on three subsequent occasions prior to finally being removed from the care of Jolene and Jimi. The first notification was made by Police as a result of a family violence call out. Shanaia was at that time eight months of age. The intervention on this occasion saw the Chief Executive becoming involved by way of a whānau/family agreement.\textsuperscript{90} The case was then closed.

A further intervention occurred when Shanaia was three and a half years of age. This time there was an agreed family group conference plan. The intervention was intended to address Jolene’s alcohol and drug abuse and her relationship with Jimi. The supports included referrals to drug and alcohol assessment/therapy and courses intended to enable Jolene to

\textsuperscript{88} Also known as a Plunket nurse.
\textsuperscript{89} When the Police are called out to incidents of domestic violence, the incidents are recorded and, where a child is involved, forwarded to the Chief Executive.
\textsuperscript{90} The family/whānau agreement is a low level of intervention by the Chief Executive in a family. It is intended to address the issues presented by the notification other than by application to the Family Court or by referral to a family group conference, although the actual intervention may well reflect what a family group conference may implement. The level of intervention reflects the principle set out in s 13(b)(ii) of the Act – it should be the minimum possible to ensure the protection of the child. In contrast to a family group conference, a family/whanau agreement has no statutory basis. A family/whanau agreement may be entered into at a ‘hui’. This is a meeting.
understand the impact of domestic violence. There was also support by visits from Family Start and the involvement of Strengthening Families.

Formal application was made to the Family Court after notification was received from the hospital that Shanaia had been admitted with significant non-accidental injuries. These included a broken arm, a number of fractured ribs and a fractured skull. Shanaia was almost four years of age at the time of this intervention.

A Police inquiry was conducted. Shanaia was unable to say what had happened. Both Jolene and Jimi denied assaulting Shanaia. The Police were not able to conclude that any one person was responsible for the injuries. There was no prosecution. Shanaia, as a consequence of the injuries, suffered cognitive impairment.

The Chief Executive filed an application for a declaration, together with a without notice application for an interim custody order. That order was made. The grounds relied on were those set out in s 14(1)(a) and (b) of the Act. Shanaia was placed in a family home. She was one of six other children of varying ages. A lawyer was appointed by the Family Court to represent Shanaia.

The Court directed that a family group conference be convened. This occurred nine weeks after the proceedings were filed. Family from both sides were present. At that conference Jolene disputed the allegations that Shanaia was a child in need of care and protection. The conference was therefore unable to move to the point of formulating any plan for the care of Shanaia or for any therapeutic or other intervention. This Court was therefore required to determine whether Shanaia was a child in need of care and protection.

Pending that defended hearing, a whānau placement was sought by the Chief Executive. It was agreed that Shanaia would be placed with her mother’s cousin, Madonna, subject to Madonna being assessed as a caregiver. This occurred. It involved the case social worker obtaining a Police check of Madonna and an interview with Madonna by a second social worker from the care team allocated to the site. Madonna was assessed as being a suitable

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91 Family Start is a community based initiative which is funded by MSD, the Ministry of Health and the Ministry of Education. Its role is to assist families by having workers visit and provide guidance/assistance to those families.

92 Strengthening Families operates as coordinating body which organizes meetings of the statutory and community agencies which will be involved in assisting families.
caregiver. Madonna did not tell the interviewing social worker that she was in a relationship with Mr Spektor, who did not live at the home but would come over and stay during the week and on weekends. It is now known that Mr Spektor had a conviction for indecent assault on a child under the age of 12 years. The interview between Madonna and the social worker occurred at the site office. No visit was made to Madonna’s home.

The placement lasted for six months. During the course of that placement the Chief Executive ascertained that Mr Spektor was a presence in the home. However, for reasons said to be due to pressures of work, no visits were made to the home, contrary to the policy of the Chief Executive.

I find that in the circumstances of this case the Chief Executive failed to meet the standard of care expected in both assessing and monitoring the placement and in undertaking the subsequent investigation.

The placement failed because it was found that Madonna had probably hit Shanaia – she was seen at a routine school check-up with bruising that could not be explained by Madonna. Shanaia also made a statement that indicated she may have been indecently touched by an adult male in Madonna’s home. Because of her brain injuries and cognitive impairment, that could not be thoroughly investigated. She was removed and again returned to the family home.

Shanaia then had a further four placements before being placed with Braden and Sarah. These included an urgent temporary placement when the family home had to take in a number of children from one family on an urgent basis. As the numbers of children would exceed the number allowed, Shanaia was placed elsewhere. This lasted for seven weeks. She then returned to the family home for a number of months pending an intended permanent placement being made.

This placement lasted a matter of some five months only. The court proceedings had not reached the stage where Shanaia could be ‘permanently placed’ in the sense that there was certainty as to placement. The case was proceeding to a defended hearing as Jolene opposed a declaration being made and was seeking the return of Shanaia. The caregivers were not prepared to take Shanaia if there was any uncertainty as to the placement. Shanaia went back to the family home. She remained there until being placed with Braden and Sarah, following the substantive hearing in this Court.
During the time Shanaia was in care, she continued to see Jolene. This was at the CYFS office. Contact occurred on a monthly basis. It was argued on behalf of Jolene that until the Court had made the declaration that Shanaia was a child in need of care and protection and had sanctioned a permanent placement, contact had to be maintained to the extent possible in the event of Jolene being successful in having Shanaia returned to her care.

Following her removal from Madonna, a full paediatric assessment was undertaken of Shanaia. She was found to have suffered brain damage and had had six fractured ribs.\(^{93}\) It was thought that she exhibited features typical of foetal alcohol syndrome. It was not possible to determine whether Shanaia had been damaged when in utero by her mother’s possible drug use. The medical examination did not provide any indication Shania had been sexually molested.

Shanaia was interviewed by the Police/CYFS evidential video unit in accordance with the Evidence Regulations 2007. Evidence was given that Shanaia was unable to sufficiently distinguish between what was true and what was a lie and accordingly any statements she made about what had happened to her, and particularly who may have done something to her, could not be relied upon.

An assessment was also carried out by a psychologist at the Specialist Services Unit of CYFS and evidence given by that psychologist. The opinion was expressed that Shanaia is a severely damaged child. She will need specialist therapy to address the legacy of her care by Jolene and her subsequent CYFS care history. This includes, but is not limited to the following:

- Attachment disorder, with Shanaia needing intensive therapy to address this so that she can be given the opportunity to form the best possible attachment with her intended permanent caregiver;

- Exposure to violence between her mother and Jimi, requiring therapeutic intervention

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\(^{93}\) The extent of the brain injury was not then was not able to be fully identified. The fractures were of differing ages, indicating the injuries being inflicted at different times.
The physical and psychological consequences of the injuries she suffered, which may
not manifest themselves for some time;

The cognitive deficiencies she is likely to have – and which will have to be the subject
of a neuropsychological assessment, which is still to be undertaken.

The defended hearing of the application for a declaration was scheduled to last three days, but
took five, spread over five weeks (three days and then a further two days). I found that
Shanaia was in need of care and protection. The hearing on the plan took one further day.
This judgment covers both hearings and contains my reasons for coming to the views I have.
The relevant sections of the Act and case law are in the addendum to this decision.94

It is not possible to find to the requisite standard that either Jolene or Jimi had been
personally responsible for the injuries suffered by Shanaia. However, I am satisfied on the
evidence that Shanaia was injured when in their care. That is sufficient. I directed the Chief
Executive to file a plan within 28 days. The proceedings were adjourned to a date to enable
that to occur. I also indicated that in respect of the allegations made about the injuries
suffered by Shanaia in the care of Madonna that I was satisfied that she had suffered non-
accidental injuries when in that placement, but that the evidence was insufficient for me to
find she had been injured by either Madonna or Mr Spektor.

I indicated to the Chief Executive that planning for a permanent placement should proceed
and that the plan should reflect that. The plan has now been filed. The Chief Executive
reports that a permanent placement with Braden and Sarah has occurred. To assist in
facilitating that placement, the Chief Executive recommends a custody order under s 101 of
the Act and the appointment of the Chief Executive as an additional guardian of Shanaia
under s 110(2)(b). Jolene opposed the plan. She sought an order that Shanaia remain in the
custody of the Chief Executive under a s 101 order but be placed in her care and that she
enter a residential parenting programme. I considered that the law did not allow me to
impose a condition as to placement on that order and, in any event, that such an outcome was

94 Not reproduced here.
untenable given the evidence that had been heard. Those orders are now made and the s 101 custody order will be reviewed in six months.”95

3.2.3 What happened next?
A further hearing took place 14 months after Shanaia was placed with Sarah and Braden. This was to achieve legal permanency. Sarah and Braden had, some six months earlier filed applications under COCA for orders for day-to-day care and appointment as additional guardians of Shanaia. These latter applications were heard concurrently with an application filed by Jolene for discharge of the orders in favour of the Chief Executive. Jolene argued that she had effected change by undergoing a parenting course and terminating the relationship with Jimi. Failing return, Jolene argued that a significant contact relationship was necessary to enable Shanaia to maintain her familial and whānau connections. Finally, Jolene was concerned not to be excluded from guardianship decisions that would have to be made for Shanaia by Sarah and Braden, who would be appointed as additional guardians of Shanaia alongside her.

In respect of contact, the Court again had the assistance of a psychologist. That person identified the primary need for Shanaia was to be able to form an attachment to Sarah and Braden. Contact was therefore to enable Shanaia to maintain knowledge of her biological family, within the parameters of emotional and psychological safety. Supervised contact was to occur on no more than three occasions in each year, and was to be for one hour in duration on each occasion.

Sarah and Braden were appointed additional guardians. They found it difficult to understand why they should have to share that status with Jolene. She had lost the right to parent Shanaia: surely, given her failure to safely provide for Shanaia, she should lose all of her rights? After all, that had been the effect of the order of the Family Court, and the placement of Shanaia with them. They had asked their lawyer why adoption was not possible, or at least why they could not be appointed as the sole guardians of Shanaia? The advice received was that adoption was not favoured as it meant that the legal relationship between Shanaia and her birth family would be severed. As far as obtaining orders for sole guardianship was

95 See ss 134(1) and 128(2) of the Act. This is not later than six months for a child under seven years and in other case, not later than 12 months – from the making of the original order. (Section 128(1) prescribes what orders must be formally reviewed.) See also n 1344 below.
concerned, this was also not possible – as such a high threshold level had to be met before an order could be made depriving Jolene of her guardianship. Further, Jolene throughout the period when Shanaia had been in care, had to a reasonable degree maintained contact with Shanaia and wanted to be involved in decision-making on matters of guardianship. It could not be argued that she was unwilling to exercise her status as guardian.  

Sarah and Braden, in making their applications, were assisted by the Chief Executive paying their legal costs. They felt somewhat apprehensive in making the application as they considered it premature. They wanted to see Shanaia settle in their care and to see whether any manifestations of the abuse that she had suffered would come to the fore. However, the social workers(s) allocated to Shanaia were adamant that in order for Sarah and Baden to show that they were committed to Shanaia they had to take the step of applying for orders under COCA. The implicit message was that unless they did so, it would be a clear signal that they were not committed to her and, therefore, an alternative placement might have to be found. As well, Shanaia, they said, would not want the stigma of being a ‘CYFS kid’.  

Sarah and Braden were, however, adamant in that event – of their applying for orders under COCA for day-to-day care and guardianship – that they wanted an unequivocal expression of support from the Chief Executive in terms of what was explained to them as the ‘Home for Life’ policy. They were aware that on the making of the orders, the financial assistance they from the Chief Executive would diminish. Their ‘entitlement’ for as long as Shanaia was the subject of a s 101 order in favour of the Chief Executive, embraced board payments, a quarterly clothing allowance (neither of which was paid promptly) and the payment of school fees and medical costs. On the making of the COCA orders, they would receive the unsupported child allowance paid by the Department of Work and Income. This equated to the quantum of the board payment. They would also receive a one-off payment of $2500 with social work support being provided for a maximum of three years by an NGO contracted for the purpose.

96 See the second limb of s 29(3) of COCA: the parent is for some grave reason unfit to be a guardian.  
97 See the first limb of s 29(3) of COCA: the parent is unwilling to perform or exercise the duties and responsibilities of guardianship.  
98 It is my experience that caregivers have quite commonly been given that message by social workers. However, when challenged, there is generally a denial. However, in one serendipitous instance, when acting for a caregiver who was in the process of getting orders but who had expressed reservations, the client was sent an email from the case social worker who conveyed that precise threat.
Sarah and Braden were concerned that they would be financially worse off and that they would not be able to cope with the realities of meeting the likely continuing needs of Shanaia given their understanding of her background. This was canvassed with their lawyer. He explained that they had little choice but to go with what the Chief Executive was prepared to offer as his legal costs were being met by the Chief Executive who (understandably) would not pay for the cost of litigation against himself. There were two alternatives: Sarah and Braden could pay themselves (which they could not afford to do) or perhaps make an application for legal aid (which they did, but the application was rejected as Braden’s income was too high).

Further assistance over the same three year period would be provided by funding the counselling required by Shanaia, subject to regular review to see if it was needed. Sarah and Braden were concerned not only with the impact and possible effect of the physical and sexual abuse Shanaia had experienced but also with the lack of attachment between Shanaia and themselves. They considered both required extensive therapeutic intervention and this should be funded and arranged by the Chief Executive. They also thought that a neuropsychological report should be obtained as this would provide them (and the Chief Executive) with relevant information about Shanaia’s current and future cognitive prognoses. The Chief Executive agreed to fund counselling for six months only. It would then be re-assessed.

There was also agreement that the Chief Executive would continue paying the equivalent of the clothing allowance for 12 months. After that period had expired, Sarah and Braden would themselves have to meet the costs involved in caring for Shanaia. This, they were told, was what parents of a child did and would be indicative of their commitment to Shanaia.

As well, the Chief Executive agreed to pay the reasonable legal costs of Sarah and Braden should Jolene take proceedings in the Family Court. However, this would be subject to the manager of the local site office being satisfied that Sarah and Braden were acting reasonably – in opposing whatever Jolene might apply for. Sarah and Braden asked if they would be assisted financially should they have to take Jolene to the Family Court in respect of contact issues or guardianship. They had been advised that should they have to make a guardianship decision, this would have to be made in conjunction with Jolene. The examples given to them included the decision to enrol Shanaia at school or if they wanted to relocate from their current town (which was where Jolene lived) given that this would impact on her contact with
Shanaia and would require enrolment in a new school. Sarah and Braden could foresee problems with Jolene in these respects. They had been advised that if there was no agreement they would have to make an application to the Family Court for a dispute between guardians. Similarly, if contact was not working for Shanaia, and they wanted to vary the arrangements in some way and Jolene refused, they would have to file proceedings to effect such variation. The Chief Executive refused to provide this support.99

The social worker told them that it was possible for the supports to be set out in a services order. However, this was not favoured as it meant that Shanaia would continue to carry the stigma of being a ‘CYFS kid’ and that the order would have to be reviewed by the Family Court, which would keep everyone in the system.100 No one really wanted that to occur. Sarah and Braden reluctantly agreed to accept the proposal that the supports to be provided to the family would be delivered through the Home for Life policy. Sarah and Braden asked what would happen if there was a change in social worker? Would that mean that the agreement that had been reached could be departed from or was it sacrosanct? They were advised that it would be a matter for the new social worker to deal with at the time.

Sarah and Braden found the following months difficult. Shanaia continued to have supervised contact with Jolene. Both before and after contact she exhibited concerning behaviours. These included soiling and smearing, episodes of self-harm, and verbal and physical abuse of Sarah. Attachment therapy was eventually implemented after a delay of five months and for an initial six sessions only. This was provided to Shanaia by a psychologist at a community social service organisation. Further sessions were requested. After another delay, this time of two months whilst the request was considered by the site manager (who was at pains to point out that the Chief Executive had no legal status in respect of Shanaia) a further six sessions were approved.

99 Sarah and Braden in such an instance could unilaterally make the decision in question and then stand back and see what happened. Would Jolene just accept their decision or would she file proceedings herself? In the latter case, the Chief Executive would be required to honour the agreement to fund the legal costs of Sarah and Braden.

100 The Act was amended in 1994 to provide that a services order (and its counterpart, the support order) would be amongst the range of orders now required to be reviewed by the Family Court. The Family Court Review Reviewing the Family Court: A Public Consultation Paper (Ministry of Justice, Wellington, 20 September 2011) asked whether such orders when made in a permanency context should continue be formally reviewed. The subsequent draft Bill did not address the issue.
Shanaia also continued to have difficulties at school. Braden and Sarah worked closely with the school and Sarah, in particular, spent considerable time at school helping Shanaia when teacher aide funding was cut back. The school made requests for additional funding to the Ministry of Education but was not successful. Shanaia was, however, referred to the RTLB teacher responsible for the local cluster of primary schools. That was the extent of the assistance provided. The Chief Executive refused to fund costs which were regarded as the responsibility of the Ministry of Education.

The placement for Shanaia with Sarah and Braden continues, albeit under some significant stress. Shanaia has been suspended from school: she has assaulted her teacher and her behaviour both in the classroom and in the playground poses a risk to other pupils. Shanaia was also referred to the local child adolescent mental health service but was not accepted. It remains unclear whether she can go back to school. Sarah and Braden have taken legal advice and are in negotiation with the Chief Executive about continued support for Shanaia. To achieve this a complaint was made to the regional office of the area in which they lived and their local Member of Parliament became involved.

This case study illustrates that the issues accompanying children who come into care may be profound and long-lasting. Shanaia went into the care of Braden and Sarah when she was aged eight years old. It did not take long for issues to arise that necessitated ongoing therapeutic intervention – counselling in respect of her attachment issues and assistance at school. Funding of support services is a significant problem and the two government agencies involved in this case are locked into their respective silos. Sarah and Braden found the Home for Life package of support inadequate in the circumstances.

3.3 Case study two: Zeppelin

This second case study is presented in the form of a typical report of a lawyer appointed to represent a young person as filed with the Family Court. Zeppelin is a young person who is 16 years of age. He has significant cognitive impairment and is unable to live independently, requiring supported accommodation. Zeppelin has no parents who are

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101 The resource teacher, learning and behaviour. RTLB teachers are allocated over clusters of schools and assist students with learning and behaviour issues as their title suggests.

102 It is modelled on a number I have written for the Family Court as the lawyer appointed to represent a young person on the cusp of turning 17 years and about to leave the care system. The report contains more detail than is usual. The circumstances of the case at the time must have necessitated a thorough and detailed analysis.
available for him, his mother now lives in Australia and his father is deceased. For Zeppelin
the immediate issue is his transition from care as a young adult and how this is best effected.

3.3.1 Report of Lawyer appointed to represent the young person
“Counsel is instructed to act for Zeppelin Plant. Zeppelin is 16 years of age. He turns 17 on
26 October next, being some five months away. Zeppelin is the son of Ms Roberta Led and
the late Mr Jimmy Plant.

Zeppelin is in the custody of the Chief Executive who is also appointed as an additional
guardian. These orders were made when Zeppelin was aged 12. The orders were required
due to Ms Led deciding, after the death of Mr Plant, that she could no longer cope with the
care of Zeppelin and her moving to Melbourne. Zeppelin wants to be reunited with his
mother and there has been some communication between them. This has led to Zeppelin’s
hopes of being reunited being raised. There has been a recent indication from Australian
social services that she will not be able to care for Zeppelin.

There has been extensive involvement by the Chief Executive from the time Zeppelin turned
seven: this saw the Chief Executive working with Zeppelin and his parents under a support
order.\textsuperscript{103} This had regard to both the profound developmental delay suffered by Zeppelin
following complications at the time of his birth and behavioural issues arising from his
subsequent diagnosis of attention deficit hyperactivity disorder. Intervention was necessary
to provide support to Mr Plant and Ms Led in order to maintain Zeppelin at home and at
school. As is also now known, there are sexual gender identification issues that are present
for Zeppelin. Some of Zeppelin’s actions have, more recently, placed him at risk as he is
sexually indiscriminate. These problems are exacerbated by his cognitive deficits. (Zeppelin
is functioning at a borderline level.)

Since being in the custody of the Chief Executive, Zeppelin was first placed with the Youth
Focus Trust, a residential placement. It was intended that Zeppelin undergo behavioural

\textsuperscript{103} A support order is made under s 91 of the Act. Section 93 provides that where such an order is made it is the
duty of the Chief Executive to monitor the standard of care, protection, and control being provided to, or
exercised over, the child and to provide, or co-ordinate the provision of services and resources (including
financial services and resources) whether from the community or otherwise, as will ensure that appropriate care,
protection, and control are provided to, or exercised over the child. A support order should be the primary order
made when children who have been the subject of a declaration are either maintained within the home or are
returned home. However, the most usual order remains the custody order.
change therapy when placed with the Trust. This was only partially successful, although the placement subsisted for almost two years before Zeppelin’s continued absconding and his sexual behaviour resulted in the decision that a one:one placement was required. Since then there have been seven placements although, of these, three involve the Torch Trust, which is a short-term respite placement (seven days maximum) utilised after Zeppelin again absconded and was located or after intended long-term placements had broken down.

Zeppelin has now been placed with Mr Jethro Tull and Ms Blodwyn Pigg at their home outside of Takitimu. The placement has lasted some eight months to date.

The Chief Executive has filed a review of plan which is intended to cover the few months leading to Zeppelin turning 17 years of age. The goals are to ensure that Zeppelin has a successful transition to independence and will live in a supported environment. This must have regard to Zeppelin’s very extensive care and protection background. The review of plan notes that on Zeppelin turning 17, the s101 order will cease to operate. The Chief Executive intends that the order for additional guardianship will continue. No specifics are referred to in terms of intended social work support to be delivered under that order.

Although the plan helpfully identifies goals and objectives for Zeppelin, as well as the assistance that is to be provided by CYFS and expectations of the caregivers, it is quite general about how this is to be achieved. Greater clarity is needed in this respect. There is considerable work required to be done before there is sufficient certainty about what is required for Zeppelin and his transition from care following his 17th birthday.

3.3.2 Zeppelin: his views

I have met with Zeppelin earlier this week. Zeppelin is keen to get out of care and looks forward to turning 17 and the discharge of the custody order. Zeppelin has a particular desire to be reunited with his mother. However, he is aware of the doubt that is now present about whether he will be able to have the relationship with his mother that he so craves. This is an issue that causes Zeppelin anxiety and manifests itself in anger (which he recognises).
3.3.3 Discussion

A significant theme for Zeppelin is his wish to be out of care, being something on which he fixates/obsesses. When this occurs Zeppelin will destroy property, verbally abuse and physically intimidate his caregivers and abscond. Threats of self-harm have been made. This occurred after my visit to him. It led to Zeppelin being assessed by the CAT Team\textsuperscript{104} and being placed back at the Torch Trust where he is likely to remain until at least Sunday or Monday. This emphasises the need for there to be an intensive wrap-around structure for Zeppelin, particularly once he returns to the home of Mr Tull and Ms Pigg.

A meeting is to take place on Tuesday morning at the Child and Adolescent Mental Health Unit. Hopefully this will provide additional clarity as to what should be implemented. It also reinforces the need for there to be further monitoring by the Court of Zeppelin’s situation.

I have suggested to Zeppelin (and I believe he accepts it), his caregivers, and the case social worker that in order to keep on top of his transition to independence and to ensure that there is oversight and monitoring, that the Court directs a further review immediately prior to Zeppelin turning 17. This will enable the Chief Executive to keep the Court appraised of the arrangements that are being made for Zeppelin and his life beyond Zeppelin turning 17 years old.

If the Chief Executive accepts that the order for appointment as additional guardian is sufficient to sustain both the placement and infrastructure of support currently being provided to Zeppelin, then no further intervention by this Court (beyond reviewing the guardianship order) need occur.\textsuperscript{105} This is subject to Zeppelin agreeing to remain in that placement. Continuing involvement by the Chief Executive should include obtaining a report on Zeppelin prior to his turning 18 to see whether he is within the jurisdiction of the PPPR Act. (Should such an order be required, it cannot be made until Zeppelin turns 18 years of age. See s 6(2) of the PPPR Act.)

\textsuperscript{104} Community Mental Health Acute Team.

\textsuperscript{105} Notwithstanding that an order for appointment as additional guardian need not be formally reviewed. However, such orders are in fact often reviewed as a matter of course in instances of young people who have turned seventeen and require ongoing intervention. See n 95 above.
If the Chief Executive does not consider any further involvement beyond Zeppelin turning 17, then consideration will have to be given to the making of an application placing Zeppelin under the guardianship of the Family Court. If made, this would provide a statutory basis for the provision of care for Zeppelin until he turns 18 years of age. This would involve the appointment of the Chief Executive as agent of the Court. A hearing may be required if the Chief Executive refuses to accept this role on being advised that appointment is required. (See s 32(2) of COCA.) The order will allow the imposition of a custodial regime, and could permit the Court to issue directions to the Chief Executive given the agency function the Chief Executive will have. See the unreported decision of in Corkhill v H.\textsuperscript{106}

Given Zeppelin’s particular care and protection history (and the continuing implications of that for his future) close monitoring and oversight is essential to ensure that everything that can be done is and will be done.”

\textbf{3.4 Conclusion}

The issues posed by these two case studies are redolent of the issues that exist for children who are in care and who cannot be returned to the care of their parents. The history of Shanaia, in part, goes beyond the precise parameters of the thesis in looking at the overall process in which she was involved. This is to show the nature of the potential consequences of the dual legacies that a child may present with.\textsuperscript{107} The balance of the narrative notes the issues that Sarah and Braden will have to face as her parents, outlining the challenges they potentially face in getting the assistance that Shanaia requires in overcoming her dual legacies. This naturally leads onto the discussion about the responsibilities of the Chief Executive in providing support for children and their new families once COCA orders are taken. Zeppelin’s story is of similar effect, but is from the perspective of a young person who must be transitioned from care on attaining the age of 17 years when the custodial power of the Chief Executive concludes.

The next chapter considers the construct of responsibility and how that applies to the role of the Chief Executive.

\textsuperscript{106} Corkhill v H FC Lower Hutt FAM 2008-032-60, 10 December 2008.

\textsuperscript{107} There was her history when in the care of her mother which resulted in profound non-accidental injury and the possibility of sexual abuse having occurred and which led to intervention. There was then her experience of being in the care of the Chief Executive which resulted in further abuse/neglect occurring.
CHAPTER FOUR

Responsibility

As captain of the ship, X was responsible for the safety of his passengers and crew. But on his last voyage he got drunk every night and was responsible for the loss of the ship with all on board. It was rumoured that he was insane, but the doctors considered he was responsible for his actions. Throughout the voyage he behaved quite irresponsibly, and various incidents in his career showed that he was not a responsible person. He always maintained that the exceptional winter storms were responsible for the loss of the ship, but in the legal proceedings brought against him he was found criminally responsible for his negligent conduct and in separate civil proceedings was held legally responsible for the loss of life and property. He is still alive and he is morally responsible for the deaths of many women and children.108

Be not afraid of responsibility: some are born [to] responsibility, some achieve responsibility and some have responsibility thrust upon them.109

4.1 Introduction

This chapter is central to the theoretical framework of the thesis as it explores what is meant by responsibility. This is in both the theoretical and practical senses in respect of the consequences for those children in care and the subjects of decision making by the Chief Executive. Hart’s writing in Punishment and Responsibility: Essays in the Philosophy of Law sets out the primary conceptual basis upon which I am relying for understanding the nature of responsibility.110 The opening quotation, which is taken from Hart, exemplifies this by

108 Hart, above n 11, at 211.
109 Twelfth Night, Act II, Scene V, William Shakespeare. (Modification courtesy of Eekelaar, above n 13, at 113). Malvolio, who is Olivia’s steward, is a bit of a wowser* and is taken to task by Maria, the mistress of the household. She composes a letter in the style of Olivia and which leads Malvolio to believe Olivia is in love with him. The quotation is from the letter, which Malvolio reads out thinking it was written by Olivia. (*“A prudish person, often religious, censorious of the habits and pleasures of others.” (Orsman (ed) Oxford Dictionary of New Zealand English, above n 85, at 924.) The relevance of both quotes, if not yet clear, soon will be.
110 This work, consisting of a series of essays discussing crime, punishment, and responsibility, was first published in 1968. In chapter IX “Postscript: Responsibility and Retribution” of the second edition published in
noting the different classifications that can be given to responsibility when it is considered in the context of a person carrying out a specific role, such as a ship’s captain in the example given, or by analogy, in the context of this thesis, with the Chief Executive.

Hart’s example of the ship’s drunken captain provides a graphic illustration of how the words ‘responsible’, ‘responsibility’, and ‘responsible for’, can be used to embrace a wide variety of meanings and situations – covering both the legal and moral paradigms and past, present and future aspects of responsibility. The Chief Executive is in a comparable situation. He, too, is the person in charge of a ‘ship’ and is responsible for those on board that vessel - his social workers (his ‘crew’) and the children who are placed in his care (his ‘passengers’). When the quotation is read afresh with the Chief Executive being referred to in place of the captain it can be seen that the Chief Executive could also be said to be legally and morally responsible for the loss of any of his crew or passengers.

Exploring the meaning of responsibility is therefore fundamental to my inquiry. Two aspects of the Chief Executive’s role are critical: firstly the carrying out the statutory duties of the Chief Executive and secondly, when the care of a child is undertaken as a consequence of a custody order. The distinction is drawn, however, because in providing for the care of a child who is placed in his custody the Chief Executive is given the task by the Act of providing a level or standard of care the same as any parent would provide to his or her child (assuming they were aware of the requisite statutory and case law thresholds prescribed by COCA) and with this having regard to the nature of the dual legacy that the child may have. This is an additional dynamic that goes beyond the usual role of a parent.

4.2 Why responsibility?
Eekelaar, within the context of discussing the relationship between parents and children, states that there needs to be a rational ground for imposing responsibility on parents, “random
selection” being insufficient.\textsuperscript{115} There must of course be an equally rational ground for imposing responsibility on the Chief Executive. In this context it derives from the decisions made, reflecting social and political mores, that in certain prescribed circumstances the State must intervene in the lives of families: that further, the State may remove a child from their family and thereby sever that familial relationship, and then find a new family or living framework for that child where the goal is the transition of the child (or young person) to independence. The logical consequence of intervention having occurred and a child permanently removed and placed elsewhere, must also be to address, as far as possible, and within the paradigm of responsibility, both the issues (or more correctly, their impact on the child of those matters) that gave rise to intervention and the consequences of any detrimental matters that affected the child whilst in care.

\textbf{4.3 What is responsibility: how it can be classified?}

As Hart portrays, ‘responsibility’ is a multifaceted concept with a myriad of meanings associated with it. A dictionary definition also illustrates this. The New Oxford Dictionary of English proffers a definition embracing both moral and legal aspects of responsibility. The core meaning of the noun ‘responsibility’ is the:\textsuperscript{116}

\begin{quote}
… state or fact of having a duty to deal with something or of having control of someone: women bear children and take responsibility for childcare.
\end{quote}

A subset of meanings is then given:\textsuperscript{117}

\begin{quote}
The state or fact of being accountable or to blame for something: the group has claimed responsibility for a string of murders:

“The opportunity or ability to act independently and take decisions without authorization: we would expect individuals lower down the organisation to take on more responsibility:

(often) responsibilities) a thing which one is required to do as part of a job, role, or legal obligation: he will take over the responsibilities of Overseas Director:
\end{quote}

\textsuperscript{115} Eekelaar, above n 13, at 114.
\textsuperscript{116} Pearsall, above n 25, at 1581
\textsuperscript{117} Pearsall above.
(responsibility to/towards) a moral obligation to behave correctly towards or in respect of: *individuals have a responsibility to control personal behaviour.*

The adjective ‘responsible’ has the same effect – “having an obligation to do something, or having control over or care for someone, as part of one’s job or role: the cabinet minister responsible for education.”

Being the primary cause of something and so able to be blamed or credited for it: *Gooch was responsible for 198 of his side’s 542 runs:*

(of a job or position) involving important duties, independent decision-making or control over others:

(responsible to) having to report to (a superior or someone in authority) and be answerable to them for one’s actions: *the Prime Minister and cabinet are responsible to Parliament:*

Capable of being trusted: *a responsible adult:*

Morally accountable for one’s behaviour: the progressive emergence of the child as a responsible being:

The definition illustrates that for every day purposes the essential principle of the Chief Executive having role responsibility and being obliged to bear the consequences of actions taken is an ever present dynamic.

### 4.4 Hart’s classification

Hart’s opening quotation with its graphic examples, illustrates how responsibility may arise and the consequences that may follow if those charged with its exercise fail in the performance of a defined role. The quotation identifies four types of responsibility, the first of which, ‘role responsibility’ has already been central to this discussion. The others are ‘causal’, ‘legal liability’ and ‘capacity’. They are overlapping, not exclusive or discrete. Hart’s classification of responsibility was subsequently elaborated on by Cane and

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118 Pearsall, above n 25.
119 At 1581.
120 Hart, above n 11, Chapter IX “Postscript: Responsibility and Retribution” at 212. However, in the subsequent discussion in that chapter Hart divides ‘liability’ into ‘legal liability responsibility and moral blame’ and ‘moral responsibility’. Given that Hart’s discussion occurs within the context of the criminal law, this not surprisingly, is a complex concept.
Eekelaar\textsuperscript{121} who look at the notion of legal liability responsibility in terms of historic responsibility\textsuperscript{122} and prospective responsibility.\textsuperscript{123} That analysis sets out the primary conceptual basis I am relying on for understanding the nature of responsibility.

This thesis is concerned with public law: the rights, duties and obligations of governments in respect of the functions of government and the corresponding relationship of the government to its citizens. The role of the law and the Courts is, in part, to provide a remedy (by way of accountability) to individuals and institutionalised groups arising from the exercise of governmental decision-making.\textsuperscript{124} The jurisprudence involved goes back to habeas corpus (still extant) and to the prerogative writs of certiorari, mandamus and prohibition which have largely but not exclusively morphed into the modern concept of judicial review and the ordinary remedies of injunction, declaration and monetary compensation.\textsuperscript{125} The concept of responsibility must therefore be seen within that public law paradigm.

It should be noted that although Hart addresses responsibility in the context of the criminal law, his analysis is still applicable to the public law context of this thesis. His discussion is about understanding mens rea, culpability, and the punishment that flows from committing a criminal act.\textsuperscript{126} However, he notes that the doctrine “prescribing the psychological criteria of responsibility”\textsuperscript{127} occurs in all legal systems, albeit manifested in different ways, but that in all “its forms it has presented both problems of analysis and problems of policy and moral justification” and that in English law it was “no easy matter” to know exactly what is required for liability to be established –“‘certain intention’ or an ‘act of will’ or ‘recklessness’ or ‘negligence’.”\textsuperscript{128} Running parallel with that is the question of ‘justification’, as whenever an act giving rise to a liability is committed, there will be concomitant explanation or context to that which will have to be taken into account when liability is determined. To that extent at

\begin{flushleft}
\textsuperscript{121} Cane, above n 12; Eekelaar, above n 13.
\textsuperscript{122} Looking at past acts undertaken and then assessing them “in terms of accountability, answerability, and liability”, Eekelaar, at 103.
\textsuperscript{123} This assesses role responsibility by the promotion of either what are believed to be good outcomes or to avoid bad ones. This is achieved by protecting against harms caused by actions or by preventing harms caused by failures. Cane, above; Eekelaar, above.
\textsuperscript{124} Cane, above; Joseph, above n 67.
\textsuperscript{125} Joseph, at chapter 25.
\textsuperscript{126} In order to be capable of being punished for having committed an offence, a person had to have the intent or knowledge to have done so or possessed powers of understanding and control that equally rendered the person liable to punishment.
\textsuperscript{127} Hart, above n 11, at 210.
\textsuperscript{128} At 201.
\end{flushleft}
least, the analysis has been subject of some critical comment by both Cane and Eekelaar given the criminal law focus of Hart. However, the classification is nonetheless capable of serving as a base to work from in understanding a conceptual basis of the paradigm of responsibility.

4.4.1 Historic and prospective responsibility

Cane contrasts (what he calls) historic responsibility - “what it means to be responsible”, with prospective responsibility - “what our responsibilities are”\(^\text{129}\) which embraces “the ideas of roles and tasks”, of establishing “obligations and duties”\(^\text{130}\) and of looking to the future. This involves an assessment of “past acts in terms of accountability, answerability, and liability.”\(^\text{131}\) Within prospective responsibility lies the associated task of acting positively to ensure that appropriate steps are taken to obtain good outcomes, what Cane describes as being “productive” and “preventive”\(^\text{132}\) responsibilities and, similarly, to avoid poor or bad ones. Should a poor outcome in fact occur, that may lead to the imposition of, and liability for, historic responsibility, meaning that the person charged with undertaking the duty did not properly do so (either personally or by an agent) with the result that there was a poor (or bad) outcome for which liability can be sheeted home.

Prospective responsibilities, which involve the avoidance of bad or poor outcomes, are categorised as “protective.” The distinction between protective and preventive lies in the notion of acts and omissions - “between harming someone and failing to prevent a person from being harmed.”\(^\text{133}\) This embraces both law and morality.

Cane argues that prospective responsibility is pre-eminent vis-a-vis historic responsibility because “prevention is better than cure and fulfillment of prospective legal responsibilities is more to be desired than punishment of non-fulfillment, or repair of its consequences.”\(^\text{134}\) That analysis, in the context of the Chief Executive is surely correct. It has to be the intention of the Chief Executive when providing social work services to a child who is in his custody to achieve a good outcome for that child and to avoid any bad outcomes.

\(^{129}\) Cane, above n 12, at 5.
\(^{130}\) At 31.
\(^{131}\) Eekelaar, above n 13, at 103.
\(^{132}\) At 31.
\(^{133}\) Cane, above n 12, at 32.
\(^{134}\) At 35.
Eekelaar accepts this analysis and takes it further, observing that historic responsibility assesses “past acts in terms of accountability, answerability, and liability”\footnote{At 103.}, whereas ‘prospective’ responsibility imposes the duty “through certain roles either to promote what are believed to be good outcomes or to avoid bad ones, whether by protecting against harms caused by actions or by preventing harms caused by failures.”\footnote{Eekelaar, above n 13, at 103-104.} Eekelaar agrees with Cane in placing ‘prospective responsibility ahead of ‘historic’ responsibility, for the same reason - the latter being “subsidiary and parasitic.”\footnote{At 104.  Cane, above n 12, at 35.}

Prima facie, the Chief Executive may be caught by aspects of each of the notions of responsibility as defined by Hart. The role is that of a head of department tasked with administration of the Act who exercises statutory powers through delegates and, in that way, establishing a causal nexus in respect of actions taken, or not taken, and consequences that follow. Equally, if an action has been taken, or not as the case may be, with consequences then following, there may be a (legal) liability that ensues – in criminal or civil law or administratively. Similarly, capacity responsibility may flow as a consequence of “understanding, reasoning, and control of conduct: the ability to understand what legal rules or morality require, to deliberate and reach decisions concerning these requirements, and to conform to decisions when made.”\footnote{Hart, above n 13, at 227.} Hart, however, sees this aspect of responsibility – being responsible for one’s actions – as not referring to legal status but to “certain complex psychological characteristics of persons.”\footnote{At 228.} In this respect, the discussion is clearly caught by the criminal law paradigm within which he is working. Hart looks at situations where a person’s responsibility for having committed a crime may be impaired or diminished in some relevant way – through mental illness\footnote{And the application of the McNaughten Rules (the common law basis for determining insanity).} or by virtue of age, the offender being a child and either being exempt altogether from liability of that liability is conditional.\footnote{Thus in New Zealand a child cannot be charged with certain crimes unless of a particular age: see the Act at s 272: where any child of or over the age of 10 years is alleged to have committed an offence other than murder or manslaughter, proceedings shall not be commenced against the child. See also the Crimes Act 1961: s 21: no child under the age of 10 years can be convicted of an offence. See also s 22: No person shall be convicted of an offence by reason of any act done or omitted by him when of the age of 10 but under the age of 14 years, unless he knew either that the act or omission was wrong or that it was contrary to law.}
Shanaia’s case study illustrates how Hart’s notion of responsibility can be seen in a public law sense given that she is in the custody of the Chief Executive. A placement must be found for her. Shanaia is placed with her aunt, Madonna. The responsible case social worker makes inadequate inquiry with the aunt, and of her personal circumstances. The aunt has a partner with a conviction for indecent assault on a child under the age of 12 years. Although the social worker found out about the presence of this person during the course of Shanaia’s six month placement, no home visit was ever made. The placement was terminated when Shanaia was found to have been hit by the aunt and an examination at hospital indicated that Shanaia had been indecently assaulted. Had proper inquiry been made by the case social worker, acting under delegated powers held by the Chief Executive and for the exercise of which the Chief Executive is responsible, it would have been revealed both that the aunt had come to notice previously for having hit a child in her care and that her partner had the previous conviction. The Chief Executive therefore failed in his responsibility to Shanaia by not making that proper inquiry. That responsibility comes from the role of being Chief Executive; the failure to have acted responsibly in that capacity (through the delegation of statutory powers) may lead to administrative liability through a claim by Shanaia under the Accident Compensation Act 2001.

4.4.2 Role responsibility

Role responsibility is derived from the role of being Chief Executive. It is this, and the exercise of it, that results in consequences and outcomes that can be measured in terms of responsibility. Hart’s discussion of role responsibility defines as its essential generalisation:

…that whenever a person occupies a distinctive place or office in a social organisation, to which specific duties are attached to provide for the welfare of others or to advance in some specific way the aims or purposes of the organisation, he is properly said to be

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142 Policy requires a visit every eight weeks.
143 Hart, above n 11, at 212. Cane, above n 12, at 32 in the context of a general discussion on responsibility, criticises Hart here on two accounts: firstly, for being too narrow in his analysis, being limited to the production of good outcomes and not embracing the prevention of bad or poor outcomes. Cane gives the examples of a lifesaver who takes seriously the task of preventing surfers from drowning, or a driver who takes seriously the duty to protect other road users from harm by driving carefully. Secondly, the duty to achieve good outcomes is not necessarily limited to those who hold a particular office and carry out particular roles or to particular tasks. He gives the examples of those who enter into agreements to do something or give undertakings, and goes further by noting that in everyday life, all activity undertaken may have within it the notion that whatever we may be doing we take seriously the actions then being taken.
responsible for the performance of those duties or what is doing necessary to fulfill them.

This is seen as being analogous with a “husband being responsible for the maintenance of his wife, parents for the upbringing of their children; a sentry for alerting the guard at the enemy’s approach.”\textsuperscript{144} There is a second aspect: this occurs when a person with such responsibility takes the role seriously when executing the role. We would therefore say of the Chief Executive that, in carrying out his duties as Chief Executive, ‘he is a responsible Chief Executive’ meaning in effect that he takes his responsibilities as Chief Executive seriously and acts accordingly.\textsuperscript{145} This is significant, for if the role is taken seriously, (in terms of decisions taken personally by the Chief Executive and through his properly authorised agents) then it is implied that decision-making is measured and well-thought-out, involving the exercise of prospective responsibility. This has implications for the imposition of responsibility in the event that there is a subsequent poor outcome.

In the example of Shanaia and her placement, there can be no doubt that the responsibility arises from the role of being the Chief Executive. The Chief Executive is vicariously responsible for the actions of his agents: to return to the extract from Hart cited at the commencement of this chapter, he is a person who occupies a distinctive place or office in a social organisation to which specific duties are attached to provide for the welfare of others and can properly be said to be liable for the due performance of those duties.

4.4.3 Causal responsibility
Here Hart is looking at actions or events that have certain consequences, results and outcomes. He gives examples: “The long drought was responsible for the famine in India”: “the Prime Minister’s speech was responsible for the panic”; the “icy condition of the road was responsible for the accident”.\textsuperscript{146} Inherent in causal responsibility is that it embraces the past tense and that it need not embrace the inference of “censure or praise”\textsuperscript{147} merely being an acknowledgement of what has taken place and being otherwise neutral, save that it provides

\textsuperscript{144} Hart, above, n 11 at 212. This is in contrast to the Chief Executive who of course occupies, as does Hart’s sea captain, a quite clearly delineated office and, as a consequence, has specific “responsibilities” that flow from the nature of that office. It is how those responsibilities are sheeted home that presents the overall conundrum.

\textsuperscript{145} Cane, above n 12, at 29; Hart, above at 213.

\textsuperscript{146} At 214.

\textsuperscript{147} At 215.
the stepping off point for proceedings to be taken in the event of the consequence of an action that has occurred being a bad or a poor outcome.

With the Chief Executive, there may be a clear causal link that can be imposed. The failure of the social worker to carry out a proper and full inquiry can be said to have led to the consequences suffered by Shanaia. The Chief Executive is ‘responsible’ for what has occurred – the actions/omissions of his employee have led to the consequences described. The essence of causal responsibility can be seen as setting up a chain of evidence that leads to liability for an historic act that has occurred and which has resulted in a bad outcome – for which responsibility, accountability and possible sanction may result.148

4.4.4 Legal-Liability responsibility

Legal-liability refers to matters such as being subject to a civil or criminal sanction – of “responsibility-based conditions of legal liability – for instance, to pay compensation, or restitution, or to be imprisoned or pay a fine.”149 This captures actions that result in liability arising for the person who has acted in a way which results in that liability occurring. In Hart’s discussion this extends to vicarious responsibility and to liability arising from tort.

Taking the example of Shanaia and Aunt Madonna, the Chief Executive will be legally responsible as a consequence of the actions taken by his agents which have led to the abuse having occurred. Whether there is a remedy or not will depend on other factors: does the Limitation Act 2010 apply? Are there ‘policy reasons’ - “wider social and political considerations”150 - that will totally or partially limit liability occurring and a remedy being available? These considerations can apply both ways – on the one hand, opening up to a range of people remedies that were not previously available, and, on the other, closing up a possible remedy because of concerns about ‘floodgates’ and/or cost to the Government that is seen as best being avoided.151 This occurs because the principle of responsibility at law arises generally: Law is a “social phenomenon” and as law is applied generally “policy

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148 Cane, above n 12, at 27.
149 At 29.
150 At 53.
151 At 53. Cane uses the example of Donoghue v Stevenson [1932] AC 562. On the one hand there was the liability owed specifically to the consumer in question who suffered injury but also dealt with “much larger social questions about the relationship between manufacturers and consumers generally.”
considerations are central to legal responsibility practices”.\textsuperscript{152} There will, therefore, be a policy construct as to why any potential liability at law may be prevented from occurring.

4.4.5 Moral-liability responsibility

The related concept of moral-liability responsibility is discussed by Hart within the legal-liability heading. A person will be morally responsible for doing something or for bringing about an outcome that is harmful to someone else. In that event, he or she is morally blameworthy/obliged to make amends for that harm, depending on certain conditions – which relate to the “character or extent or a man’s control over his own conduct, or to the causal or other connexion between his action and harmful occurrences, or to his relationship with the person who actually did the harm.”\textsuperscript{153} Cane, however, sees moral-liability responsibility as a distinct concept from legal liability responsibility with the difference between the two “residing in the conditions for incurring each respectively.”\textsuperscript{154} In doing so, he seeks to get a “better understanding of the relationship between legal and moral responsibility and between legal reasoning and moral reasoning.”\textsuperscript{155}

In Shanaia’s case there may be an impediment to the imposition of legal liability, notwithstanding that role, causal and capacity responsibility otherwise exists. However, that is not to say that morally, responsibility should not be sheeted home. What is or is not moral will be a reflection of the current mores and values of society and is therefore, as with the law, a social phenomenon.\textsuperscript{156} The actions that are found to be deserving of moral sanction may therefore be precisely the same as those that escape legal sanction. Cane discusses the gap between what may be morally responsible and what may be legally responsible within the context of the “so-called ‘duty to rescue’.”\textsuperscript{157} I have modified his example to further illustrate the point: If a person fails to render aid to a child who is being physically hit by a parent in the street should that person be reproved (morally) for not intervening? Should he be the subject of a criminal sanction? The inference is that moral reprobation may be appropriate but not so criminal liability. What if that person was a statutory social worker able to exercise powers under the Act to protect children (or a school teacher)? Is the

\textsuperscript{152} Cane, above n 12, at 54.
\textsuperscript{153} Hart, above n 11, at 225.
\textsuperscript{154} Cane, above n 12, at 29.
\textsuperscript{155} At 4.
\textsuperscript{156} At 27.
\textsuperscript{157} At 55.
response the same? Is the moral reprobation felt more strongly? In the case of Shanaia, should there be a sanction via the criminal law or through a public law remedy, if the Act has not been complied with? Irrespective of whether it is a single category or two distinct categories, the Chief Executive is nonetheless embraced by it and/or them, subject to any policy limitations that may be imposed when legal-liability is at issue.

4.4.6 Capacity responsibility
This refers to the requirement that before a person can be held liable for their actions he or she must have the required physical or mental capacities normally anticipated of a person who is to be held legally or morally responsible for actions they have either directly or indirectly carried out.\(^{158}\) The Chief Executive is a person who has capacity responsibility, the position being the creation of statute and with specific duties being prescribed under the CYPF Act. The Act binds the Crown.\(^{159}\) Liability will arise through the operation of the Crown Proceedings Act 1950 and the Judicature Amendment Act 1972.\(^{160}\) The consequential issues in that case will be similar to those arising in most other cases: will the claim be statute barred under the Limitation Act 2010? Are there any policy limitations on the extent of the liability that otherwise exists?

4.5 Problems with Hart’s analysis
Hart’s analysis may be limited in its broader application, with both Cane and Eekelaar examining and critiquing his classification and the basis for it. Firstly, there is his focus on the criminal law which means that he ignores both civil and public law. Secondly, he fails to integrate role, causal and capacity responsibility into the discussion of legal liability responsibility, and does not explain the relationship between the various types of responsibility. Thirdly, is his emphasis that “liability to incur a sanction is the core sense of responsibility”.\(^{161}\) Others look to a more general notion of accountability or answerability, of

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\(^{158}\) Cane, above n 12, at 29.

\(^{159}\) Section 3.

\(^{160}\) The former makes the Crown directly liable by action in respect of for example, breaches of contract or trust, tort (subject in this instance to the limitations imposed by s 394 of the Act), or causes of action arising from other statutes or recovery of property and for which there is no equally convenient remedy against the Crown. See Joseph, above n 67, at 599-600.

\(^{161}\) Cane, at 30.
having done something and then having to explain or answer for what has occurred. Cane rejects the notions that a sanction must exist for responsibility to be present and, further argues that it is appropriate to place an emphasis on accountability or answerability - the former because a person may assume “responsibility and be held responsible even if no sanction will be incurred as a result” and the latter because accountability/answerability is.

...unduly restrictive ...it suggests a focus on bad outcomes; whereas a person can be responsible and claim responsibility, for good outcomes as well as bad ... the backward-looking orientation of both sanctions and accountability tends to conceal the importance, both within the law and elsewhere of ... prospective responsibility ... [t]he law is just as, if not more, concerned with telling us what our responsibilities are, and with encouraging us to act responsibly, as with holding us accountable and sanctioning us in case we do not fulfill our responsibilities.

However, and notwithstanding those criticisms, the Hartian analysis, in terms of its description of role (and legal) responsibility and when considered alongside the modifications proffered by Cane and Eekelaar, provides an appropriate theoretical and conceptual basis for the thesis. It is also congruent with another and more simple analysis – the meaning of ‘responsibility’ at an everyday level as has been seen by the previous discussion of the dictionary definition of responsibility and by the next part of this chapter. For my purpose, therefore that classification, when seen in the context of subsequent writing by Cane and Eekelaar, provides the necessary conceptual foundation responsibility to understanding the role of the Chief Executive within the statutory context.

4.6 The Chief Executive and responsibility

The responsibility that flows from the being Chief Executive captures the need to undertake the statutory role in a properly ‘responsible’ way: to comply with prescribed statutory duties; to exercise statutory powers and discretions in such a way as to effect good outcomes; and to

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163 Although within Hart’s paradigm of the criminal law and punishment and responsibility, such an emphasis is apt.
164 Cane, above n 12, at 30.
165 Cane, at 30.
166 As discussed in Chapter Six.
be held legally and morally liable for poor outcomes and/or any breaches of statutory duty.\textsuperscript{167} Importantly, the Chief Executive must, therefore, also show a level of parenting to children in his care that exceeds the minimum thresholds required of a parent of a child by the Act, and which, if not met by a parent, would allow the Chief Executive to intervene using the authority of his statutory powers to prevent abuse and neglect.

However, the duties owed at law by the Chief Executive are not simply directed at the children who are the subject of his intervention and who may be in his legal care. The Chief Executive is also bound by his obligations as head of the department charged with administration of the Act. In this respect he has other competing statutory duties that must also be complied with. Brown refers to the tension that exists:\textsuperscript{168}

\begin{quote}
… between a demand driven service and capped funding and … [also] the obligation on the Chief Executive of ensuring the Department expenditure is managed in accordance with the financial regime created by the Public Finance Act.\textsuperscript{169} I am reliably informed
\end{quote}

\begin{footnotesize}
\textsuperscript{167} See s 7 of the Act where the duties of the Chief Executive are set out, reproduced in Appendix One. Briefly, the section requires the Chief Executive to take such positive and prompt steps, as in the opinion of the Chief Executive, will best ensure that objects of the Act as set out in s4 are attained and this occurs in a manner consistent with the principles set out in ss 5 and 6 of the Act. In addition to the general requirement that the Chief Executive ensure that the objects of the Act are met, there are also some more specific and less well-known requirements that are cast as statutory duties. For example, s 9 requires “any person who takes any action, or makes any decision, under this Act that significantly affects any child or young person, that person is to ensure that, wherever practicable … [certain specified persons including parents, guardians, and the child or young person] are informed of that action or decision…” Similarly with s 10 and the duty to ensure that where actions or steps are taken (whether by a court or by any person), where the first or preferred language of the child or young person or a parent or guardian is Maori or a language other than English or where the child or young person or parent or guardian by reason of physical disability is unable to understand English, it is the duty of that person to ensure that the services of an interpreter are provided. The duty in both instances extends beyond the Chief Executive – by virtue of the expression “any person” but certainly includes the Chief Executive. See also s 34 in respect of the duty to of the Chief Executive to give effect to the decisions of a family group conference. The Chief Executive is enjoined by s 34(1) to “consider every decision, recommendation or plan” and unless it “is clearly impracticable or clearly inconsistent with the principles” set out in ss 5, 6 and 13 of the Act, to implement those decisions, recommendations or plans “by the provision of such services and resources, and the taking of such actions and steps, as are necessary and appropriate in the circumstances of the particular case.”

\textsuperscript{168} MJA Brown Care and Protection is About Adult Behaviour: The Ministerial Review of the Department of Child, Youth and Family Services: Report to the Minister of Social Services and Employment (Ministry of Social Services and Employment, Wellington, 2000) at 24. (Emphasis in original.) This is reinforced by the recently introduced Vulnerable Children’s Bill 2013 (150-1. This contains provisions which require certain Chief Executives to work together to address issues for vulnerable children. Notwithstanding the rhetoric behind this the Bill is clear, stating that no legal duties are created and the relevant provisions are subject to the Public Finance Act 1989. See the discussion in Chapter 13.

\textsuperscript{169} The purpose of the Public Finance Act (“PFA”), which binds the Crown, as set out in the Long Title, in apart at least is to provide a framework for Parliamentary scrutiny of the Government’s management of the assets and liabilities of the Crown, including expenditure proposals, and to establish lines of authority for the use of public financial resources. This is given practical effect by Part One of the Act dealing with appropriations. The essence of these is that a department, which is defined as department or instrument of the Government or any
\end{footnotesize}
that the Department has received legal advice that where the Chief Executive is unable to meet statutory expenditure obligations she may be in breach of her statutory duty [under the CYPF Act] but that the duties under the Public Finance Act are paramount in any conflict under her statutory responsibilities.

The effect of these provisions is therefore to subjugate the administration of the Act and the implementation of child welfare policy to an overarching financial dictate as part of broader governmental policy.171 There are also public policy considerations that limit the liability at law of the Chief Executive in respect of any breaches of statutory duty that may occur.172

4.7 The nature of responsibility in this context

In the second of the opening quotations to this chapter, Eekelaar replaced Shakespeare’s original word ‘greatness’ with ‘responsible.’ Although the world of “executive monarchy had passed” the notion that the son of a king inheriting responsibility is not something that is necessarily seen as being an “odd idea”; and that politicians “achieve responsibility with political success”, presumably by becoming ministers in the government of the day. 174

branch or division of the Government (see s 2 of the PFA) and which captures the Department of Child, Youth and Family Services must not incur capital expenditure or expenses other than as expressly authorised by an appropriation or other authority or by or under an Act, must not spend money other than in accordance with statutory authority (see s 6 of the PFA). Section 34 of the PFA provides that the responsibilities of departmental chief executives, defined in s 2 of the PFA as meaning, in the case of a department, the head of the department and includes a chief executive appointed under the State Sector Act 1988, and therefore capturing the Chief Executive of the Department of Child, Youth and Family Services in respect of financial management, embrace being responsible to the Responsible Minister for the financial management and financial performance of the Department and to comply with any lawful financial actions required by the Minister (responsible for the PFA) defined in s 2 of the PFA as meaning the Treasurer, or other Minister of the Crown who, under the authority of any warrant or with the authority of the Prime Minister, is for the time being responsible for the administration of this Act or particular provisions of this Act or the Responsible Minister.

170 The Chief Executive at the time was Ms Jackie Pivac.

171 The Vulnerable Children Bill is to the same effect. The Bill, at clauses 7 and 8, if passed, will see the Government set priorities for vulnerable children and with there being vulnerable children’s plans being prepared and which will prescribe how the needs of such will children will be addressed. However, while the Bill will bind the Crown, clause 11(2) potentially renders the vulnerable children’s plans meaningless as such plans, once promulgated, do not create any legal rules or any legal rights that may be enforceable in a Court. Neither will they limit the way in which a chief executive is required to exercise a statutory duty. Lastly, clause 13(2) makes it clear that the vulnerable children’s plans do not limit or affect the operation of the Public Finance Act 1989 nor do they override any other law that may be contrary to them.

172 These are beyond the scope of this thesis. But it is worthwhile to note the operation of the Limitation Act 1950 and case law such as noted in David Nield, above n 8, at 185. See also Hoyano and Keegan, above n 8, who also discuss the New Zealand situation within the context of a broader discussion of law and policy relating to child abuse and by examining the situation in a range of jurisdictions.

173 Eekelaar, above n 13, at 113.

174 At 113.
The situation of a government department is perhaps analogous to executive monarchy, “although the modern executive casts an infinitely broader shadow than the Sovereign or the Sovereign’s representative in whose name many executive acts … are performed.”

The executive exercises the powers and functions of central government, within the context of parliamentary sovereignty, (and noting here the classification of governmental powers into the three categories of legislative, executive and judicial). Within this executive umbrella are those departments of government under ministerial control. Day-to-day control of a department is the task of the chief executive of that department. Appointment of a chief executive occurs under the provisions of the State Sector Act 1988. The duties, tasks and responsibilities will be prescribed by the statute in respect of which the chief executive in question is charged with administering and by other related legislation.

The Chief Executive is therefore ‘born to’ or ‘inherits’ responsibility in the sense that the person acquires that attribute at the time of appointment to the position. Responsibility is not an attribute that is achieved through effort or endeavour as the role is exercised: rather, it is inherent within it and through the exercise of statutory powers and discretions conferred and contemplated by the CYPF Act. Parliament, by providing that the Chief Executive is the person in whom custodial status is vested, has determined this outcome.

The role that is undertaken, therefore, determines the existence of the responsibility that flows. The larger questions concern the nature and extent of the Chief Executive’s responsibility.

4.8 The CYPF Act and responsibility

As will be discussed in detail in Chapter Six, the effect of a custody order under s 101 of the Act is as if a parenting order had been made in favour of the Chief Executive. In carrying out the task of parenting a child for whom he has custody, there is an unequivocal duty at law to meet the same responsibilities as any parent of a child would. This is clearly derived from his role, in the exercise of conferred statutory powers.

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175 Joseph, above n 67, at 239.
176 At 37.
177 For example, the Public Finance Act 1989.
178 The Act does provide for others to have custody of children or to be appointed guardians. These conclude a variety of non-governmental organisations that are approved under the Act as Child and Family Support Services or as Iwi Social Services. However, it is the Chief Executive who has the statutory mandate, along with the Police in the first instance, to intervene in cases of child abuse and to commence proceedings in the Family Court.
In terms of responsibility derived from the governing statute (legal responsibility), the Chief Executive is obliged by s 7(1) of the Act to:

… take such positive and prompt action as will in the Chief Executive’s opinion best ensure –

(a) That the objects of this act are attained; and

That those objects are attained in a manner that is consistent with the principles set out in sections 5 and 6 of this Act.

In carrying out the task of parenting a child who is in his custody, the Chief Executive has a duty at law to provide quality care to children who come into care, having regard to the legacy issues they present with. In doing so, the Chief Executive has the same responsibilities as any parent of a child would, being clearly derived from his statutory role. This comes through the nexus arising under public law via the CYPF Act and the duties and obligations found in private law under ss 16 and 48 of COCA.\(^\text{179}\)

At the same time, there are general societal expectations that arise from the expectation that if the parents of a child fail in their parenting role to the extent that the Chief Executive must intervene and permanently remove the child, then the Chief Executive carrying out his statutory role must better provide for that child than could his or her parents. These expectations can best be explained in terms of a moral responsibility that the Chief Executive owes to the children who are in his care, to the parents of those children, to their caregivers and to the population at large. This moral responsibility is also evinced in a far broader way as it encapsulates everything the Chief Executive does in the exercise of his statutory powers and discretions in respect of the children in his care.

4.9 Responsibility and private family law - and the Chief Executive: a discussion

In the family law arena, responsibility is a theme that necessarily arises when discussing the relationship that exists between parents and their children. This is codified, as COCA in its description of the incidents of guardianship has ‘responsibilities’ being referred to together with “duties”, “powers” and “rights” vis-a-vis parents and children.\(^\text{180}\) This is in respect of the role that a parent has in being charged with the upbringing of his child. These incidents of guardianship embrace the role of providing day-to-day care, of contributing to the child’s

\(^{179}\) Referring, respectively, to the incidents of guardianship and of parenting on a day-to-day basis.

\(^{180}\) See s 15(a) of COCA.
intellectual, emotional, physical, social cultural, and other personal development, and assisting the child to determine important matters affecting the child - the child’s name and any changes that may be made to it, changes to his or her place of residence that may affect the child’s relationship with parents or guardians, non-routine medical treatment, the where and how of education, and culture, language and religious denomination and practice.\textsuperscript{181} A fundamental change in COCA from the Guardianship Act was the removal from its lexicon of the expression ‘custody’ and its accompanying definition of the “right to possession and care of a child.”\textsuperscript{182} Rather COCA now, and quite unequivocally, provides that a child is not the property of its parents but is rather an individual who is a member of the family and who is to be nurtured, protected and respected.\textsuperscript{183}

There is an inherent contradiction in the Chief Executive being given the task of providing for the care of children who are in his custody as if he was the beneficiary of a parenting order made under COCA, in that the Chief Executive personally does not undertake that task but rather, exercises the role through agency. However, this is what the law provides when the State assumes custody of a child under the Act.\textsuperscript{184} It is useful therefore to distinguish between what is involved in terms of parental responsibility (parenting a child) when the State intervenes in a family from the more abstract concept of the role of a natural parent in ensuring that the welfare and best interests of a child are met. This has been part of an ongoing debate about the nature of the child - parent relationship. It was exemplified in a further instance noted by Eekelaar in the 1984 report of the Department of Health and Social Security, where it was stated that:\textsuperscript{185}

> The interests of children are best served by their remaining with their families and the interests of their parents are best served by allowing them to remain with their families and the interests of their parents are best served by allowing them to undertake their natural and legal responsibility to care for their own children.

\textsuperscript{181} See s 16 of COCA.
\textsuperscript{182} In contrast, in the CYPF Act, its definition of custody uses that previously found in the Guardianship Act and in respect of “guardianship” uses that of COCA. The reference to COCA in s 104 is to the care aspects inherent in COCA whilst maintaining the possession notion. See Chapter Six below.
\textsuperscript{183} BD Inglis \textit{New Zealand Family Law in the 21st Century} (Thomson Brookers, Wellington, 2007).
\textsuperscript{184} See the discussion below at Chapter Six.
That dictum is of universal application, but does not tell us what is expected of the State when a child cannot remain with her family. What is relevant is the nature of the duties and tasks owed by a parent to the child in actually parenting that child. The question then is whether the law requires the Chief Executive to meet the same standards of care – and to have regard to the same principles – those prescribed in ss 4 and 5 of COCA - as a natural parent or whether a different standard is required? This question can be properly asked as there is a ‘minimum threshold’ of parenting that must be met by parents of children: if they fall below this threshold, the Chief Executive is able to intervene under the grounds specified under s14 of the Act. It would be untenable if the threshold of parenting required of the Chief Executive was to do no more than match that minimum level of parenting below which intervention by the Chief Executive is not possible. The expectation must be either that it is the same or higher, and it is my premise that is higher. The context of why intervention occurred is critical. This was because the child was at such risk of abuse and neglect that the parents could no longer be entrusted with the responsibility of parenting the child and removal is necessary. That child is likely to have been profoundly harmed. That harm must be addressed and remedied and the child found a safe caring new home. These tasks require resources and expertise beyond the range of many parents.

Eekelaar looked at the concept of responsibility - within the context of family law and personal life - asking what is involved when we talk of parents as ‘being’ responsible in terms of parental responsibility.186 This concept comprising two distinct senses: the duty of care owed by parents to their children187 and the role of parents, not the State, to promote the welfare of their children. Eekelaar saw this as comprising two aspects of Hart’s notion of role responsibility. He also accepted, and elaborated on, Cane’s historical/prospective distinction by suggesting that Cane did not go far enough in his analysis of prospective responsibility. Eekelaar noted that Cane, in part, criticised Hart for “associating prospective responsibility with roles and tasks” with Cane considering it to be “more open-ended.”188 Eekelaar opined that Hart’s “more expansive view that a responsible person took his tasks seriously and tried to make serious efforts” to achieve those tasks “may be closer to some

186 Eekelaar, above, n 13, at 103, and with the discussion largely canvassing divorce and parenthood. Eekelaar had examined this initially in 1991 within the context of the expression “parental responsibility” as that was discussed in the lead up to the enactment of the Children Act 1989 (UK). See Eekelaar “Parental Responsibility: State of Nature or the Nature of the State?” (1991) JSWFL 37 – 50.
187 Used in that way so as to qualify the notion that parents only had rights in respect of their children.
188 Eekelaar, at 105.
aspects of the contemporary ethos in personal law and policy”, drawing a distinction between “the allocation of responsibility, and the exercise of responsibility.” 189 Eekelaar’s example was taken from a case of incorrect sperm donation. The wrong sperm was inserted into the wrong woman; the sperm donor was black and the other couple (the wrong donee) was white. The couple who gave birth to the children (twins) wanted to keep them and the donor agreed to this. 190 The issue for the Court was whether the mother’s husband could be characterised as the children’s legal father. The answer was that the applicable legislation did not allow for that. This meant that the biological father could have used his status to challenge the placement stability of the family and the mother could have sought to extract child support. The question posed by Eekelaar was whether the allocation of responsibility for children as provided by English law, was flawed? Should the allocation of responsibility be prescribed for the donor as occurred or should that arise either by express agreement or by inferred conduct?

It was in this context that Eekelaar made his comment about Malvolio, giving the example of a person who, without putting himself at risk, saves a child from being harmed, and “has responsibility for the outcome thrust upon them.” 191 It is not inconsistent with (the concept of) being responsible, for legal or social norms to “designate certain adults as standing in a special relationship to children, whether those adults have chosen to or not.” 192 As noted, this cannot occur on a random basis; a rational ground is required. For that reason, in the example above, the genetic parent is the “first source of responsibility” 193 as the child was brought into being by the parents and owes its existence to those parents. 194

With the Chief Executive there is a very clear and rational ground – the action of policy and law leads to the conclusion that where children are abused the State must:

- intervene and take appropriate steps to protect them; 195

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189 Eekelaar, above, n 13, at 105.
191 Eekelaar, at 113.
192 At 113.
193 At 114.
194 Eekelaar at 114 -117 went onto fully canvass seven necessary guiding principles in allocating responsibilities to adults over children.
195 See, for example, the decision in Chief Executive of Department of Child, Youth and Family Services v B [2004] NZFLR 603.
and, importantly further having intervened ensure that the reasons why intervention occurred are addressed;

and, further, when children are permanently removed from families ensure that those children are as well set up for ultimate independent living as can possibly be achieved.

Turning to the exercise of responsibility, Eekelaar in the context of parenthood, notes the historical changes that occurred from the early 19th century when the slow change began from protecting the interest of the parent in the child (as opposed to advancing those of the child) to the changes that occurred as a consequence of the welfare considerations leading to the amelioration of the exploitative aspects of the industrial revolution. By the latter part of the 20th century this had been turned on its head, with the welfare and best interests of the child coming at the forefront. Parents were expected to exercise their powers over children having regard to that principle. This is, of course, the situation in New Zealand and is exemplified by COCA and its prescriptive analysis of what constitutes the welfare and best interests of the child.

Eekelaar then observes, when discussing a “fuller concept of responsibility”, that to be fully responsible requires not only the ability to give an account of one’s self as a rational human being but also to provide reasons which must be offered to “establish responsible action.” This involves the expectation that the actor is capable of showing that his actions (and inactions) are understood in terms of consequences on others. If that appreciation is present, it will result in behaviour being modified notwithstanding any claim to entitlement that the person otherwise has. “It is a manifestation of recognition of ‘the other’ and of

196 The different situation (emphasis) in the England as opposed to New Zealand should be noted: this arises from the operation of the European Convention on Human Rights. This was incorporated into domestic law in the United Kingdom in 2000. It demands that respect people’s right to private and family life.
197 For example, extra-judicial moves have supported this: the Early Intervention Project initiated by the then Principal Family Court Judge in 2010 contemplated separated parents being referred to ‘Parenting Through Separation’ classes so that can obtain an understanding of the dynamics involved in being a separated parent and on being able to exercise decision-making for the children in a responsible way.
198 Eekelaar, above n 13, at 127-131.
200 Eekelaar, at 128.
acceptance of community.”

Being responsible in this context, involves a preparedness to go beyond the obligations at law may have – by not enforcing rights that one have or by assuming duties that you are not required to accept.

Whilst that may well apply in the private law arena, there is an ultimate difficulty in saying that there is a direct analogy with the public law arena. Here limitations on action may apply because of the operation of law or the principle that those exercising statutory power can only do so within the express terms of the statute or, if there is doubt, in terms of what may be permissible by a purposive construction to the particular statutory provision or policy/administrative restrictions. Nonetheless, it is perfectly reasonable, and is to be expected, that the Chief Executive should be able to give an account or explanation of his actions (or inactions) as expected of a rational human being. Thus, returning to the example of Shanaia and her placement, this is because the Chief Executive is exercising a statutory power which allows him to place Shanaia and it is to be expected that this will be a safe placement and one which is selected for her after proper inquiry. This process would reflect the application of policy prepared by the Chief Executive and derived from statutory powers. The Chief Executive should be complying with applicable policy which will reflect the relevant statutory criteria and against that the Chief Executive’s actions can be measured.

4.10 Case law and responsibility

In any given instance, the responsibility of the Chief Executive may involve a myriad of situations that can arise from the moment a notification is made concerning a child who is perceived to be at risk and continuing throughout the intervention that follows. Certain of these situations may present as being in conflict with one another. The following instances, which have been the subject of comment from judges, illustrate this point:

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201 Eekelaar, above n 13, at 128.

202 Thus the children raised in the wrong family in his sperm donor example were sustained within the families they had grown up in. The parents of the children were prepared to assume responsibilities that were not required to.

203 Again, for example, the Public Finance Act 1989.

204 For example, s 13(a) of the Act and its (mandatory) injunction hat children must be protected from harm, their rights upheld, and their welfare promoted.
➢ the responsibility not to subvert issues of process when having intervened by making decisions about placement that may inadvertently or otherwise predetermine the outcome:\(^{205}\)

➢ to ensure that social work decisions are taken with due regard to s5(f) of the Act and the time frame of the child in respect of decision making:\(^{206}\)

\(^{205}\) See for example, in Chief Executive v N FC Wanganui FAM 2008–083–187, 3 September 2008. The Court had made an order under s 78 and there had been consent to a declaration being made. The Chief Executive proposed to place the children with their mother in Wellington, in what would amount in certain situations to “relocation.” This was opposed by father who wanted to have care of the children. It was stated at paragraphs [22] and 23:

[22] I do require to comment also upon Ms Devlin's concern that the Chief Executive is proceeding down a preordained path, thereby defeating due process. While the hearing before me did not permit a full assessment of the allegations and counter-allegations and concerns, it cannot be said that Ms Devlin's concerns over process lack foundation. Indeed, I have in earlier cases seen situations where the Ministry has embarked on strategies for placement which, if carried through, mean that it would be extremely difficult and indeed traumatic for children and families to back-pedal from the arrangements that have been put into place well before substantive matters have actually been determined.

[23] I am not saying the Ministry has been doing this deliberately, for I fully appreciate the implication of precious resources and their need to try and do their best, but what I wish to remind the Chief Executive of is that the making of a s78 Order is not a licence for such use of power. It is a holding measure to protect a child or children's situation while there is an interactive family focus process set in train in accordance with the principles of the Act. In the situation before me a s78 Order was made followed by the current consent to a declaration. Pending determination of disposition orders and the approval of a final plan, the Chief Executive has a duty at law to recognise and respect the rights of parties to be heard on those final matters rather than act, inadvertently or otherwise, in a way that limits or predetermines that outcome. To do so defeats the very fabric of the Act.

\(^{206}\) See Re HM (care and protection) [2001] NZFLR 534 where the Court dismissed an application for declaration in a situation where urgent proceedings were first filed on 11 May 1999. A without notice custody was sought. The court ordered the applications be placed on notice. There were at least four occasions when the Court directed the Chief Executive to file evidence in accordance with timetables set by the Court. The Chief Executive failed to comply and finally, some 15 months after first filing the application for declaration and interim custody, advised the court that no further evidence would be filed and that reliance was had on the evidence on the file. The application was dismissed, the Court finding that there had been “intentional and contumelious default by the Chief Executive” (see paragraph 2 of the headnote) and that “delay had been inordinate.” (See paragraph [40].

In Child Youth & Family Service v G & P FC Upper Hutt CYPF 078–18–02, the Court was concerned for a child aged 20 months. The child was in the custody of the Chief Executive. The parents wanted mother to have care. This was opposed. A declaration had been made. The Chief Executive wanted the custody order to be continued and to be appointed as an additional guardian. It was planned to locate a permanent caregiver. The plan filed by the Chief Executive did not specify a particular caregiver nor was any timeframe proposed for the planning that would be required to locate a caregiver. In the meantime, mother had been slowly effecting change. At paragraph [71] the Court commented on the situation that confronted her in terms of deciding how the care for this child could best be met:

“[71] Having considered the evidence of G’s [mother] position and readiness to parent [the child], I am persuaded that she does not pose a serious risk to him, and it is proper to return him to her care.... Had Child Youth and Family presented to the court a fully prepared placement option, with whanau support and completed caregiver assessments, it would have been harder to put G’s delay in such a favourable light. But if the Court’s decision supports Child Youth and Family’s plan, it will be yet months before this child who is 20 months old is permanently placed. That is unacceptable delay.”

See also the decision in McCallum & Litten v Fong & others FC Whangarei FAM 2005-088-357, 21 December 2007. This saw a child permanently placed with non-kin foster parents as opposed to any members of the
to have regard to the rule of law (that is, to abide by existing orders in force and to seek to set them aside if those orders are contrary to the welfare and best interests of children even if the children may be perceived as being at risk in some way): 207

To have in place appropriate plans for the care of children who are in the custody of the Chief Executive, and in this context, plans for the permanent care of a child where that is intended. 208

4.11 Prospective responsibility (outcomes)
When measuring responsibility and asking whether the Chief Executive has fulfilled his responsibilities, an appropriate tool is the use of academic literature/empirical research that examines the outcomes for children in care. However, measuring outcomes is difficult; few comparative studies exist, measurement criteria are not uniform, and it is “difficult to take account of the many and compounding variables.” 209 Nonetheless, the responsibility of the Chief Executive must, at the very least embrace the observation by Brown that the “minimum requirement and justification” for such an intervention [in permanently removing a child from his family], when it is done by the State, must be that any such placement is will safer and...
less traumatic.”\textsuperscript{210} This outcome represents the fundamental nature and extent of the role responsibility held by the Chief Executive, but ultimately falls short of the ultimate responsibility owed to these children.

The question of actual outcomes for children in care is relevant to this inquiry, and ‘on target’ when seen in the context of implementation of the work carried out by statutory social workers acting under delegated authority from the Chief Executive and/or in the exercise of conferred statutory powers. If the outcomes are ‘good’ – whether for a specific child or for the generality of children, then it might be said that the Chief Executive has met his responsibilities to that child or children. Equally, if the outcomes cannot be so described then the converse might be said to be the case. This goes in part at least, to answer the question previously identified – what is the nature and extent of the responsibility that the Chief Executive has? This is a ‘responsibility’ for outcomes – be they good, poor or outright bad, and in respect of this category of children, encapsulates the child welfare paradigm noted in respect of the social contract discussed in Chapter One. Those outcomes may be viewed in two respects. Firstly, in looking forward to what should be done and to what should occur – the responsibility being prospective with the question being: we know what must be done – and then looking to see that the person carrying out the role of doing it, does so responsibly – in good faith and in accordance with expected standards and with the intention of achieving a positive outcome. The second is the retrospective examination of what has occurred – and assessing whether what has been done was done appropriately and, if the outcome was one which is poor or bad, in determining both the nature and extent of any failure and exploring issues of liability.

\textbf{4.12 Conclusion}

The responsibilities that the Chief Executive has come from the role of being Chief Executive and being required to exercise statutory duties and functions that are prescribed by the State. To use Hart’s classification, it is an instance of ‘role responsibility’. However, when seen in more concrete terms, the responsibility to be exercised is that embraced by prospective responsibility as described by Cane and Eekelaar: the Chief Executive when making decisions for children in his care (whatever those decisions may be) and when planning for the future care of those children, must ensure that good outcomes occur and that neutral, poor

\textsuperscript{210} Brown, above n 168, at 170.
or bad outcomes do not.\textsuperscript{211} In this respect, the Chief Executive’s actions in the provision of care does no more than reflect the law and its effect: Parliament was clearly intending, by enacting both ss 101 and 104(1)(a),\textsuperscript{212} that in providing custodial care to a child, the standard of care provided exceeds the standard of care provided to a child by a natural parent. Although s 104(1)(a) appears to impose on the Chief Executive an obligation only to meet the lowest standard of acceptable care that a natural parent may provide to a child (as if it fell below that standard a care and protection issue would exist), this is clearly a non-sequitur and cannot be so. The level of care provided has to address the care and protection concerns that first gave rise to intervention and, where applicable, the care legacy as well. The Chief Executive has a responsibility to find a safe permanent placement for the child (where the child will become an integral part of that family)\textsuperscript{213} and where a family placement is not possible, through the provision of a combination of foster care and social work intervention ensure that the child, exemplified by the example of Zeppelin, has a successful transition to independence. Where, as is often the case and Shanaia is indicative of this, the permanent placement is made but the concerning behaviours continue, then the prospective duty to persist and remediate them to the extent possible. This is a manifestation of the welfare responsibility that is owed to children in care.

Lastly, and importantly, there is the individual subjective experience of those who are now adults and who as children and/or young persons were in the custody of the Chief Executive. When reflecting on their life in care, the test for the child as to whether the intervention was successful is, inevitably, a subjective one. Can the now adult say: ‘I cannot complain about the decisions and actions that have been taken by the Chief Executive and/or by the new family that I was placed in/or that I have made a successful transition to independence, then the Chief Executive has met his responsibilities to that child. If that adult looks back and is obliged to say: ‘I am worse off as a consequence of the intervention by the Chief Executive in

\textsuperscript{211} The reality may be that the dual legacy that accompanies certain children may be such that at best a neutral outcome is the best that can be expected. If that is reality, then the outcome is proper subject to everything being done that could have been expected to be done to remedy the issues presented by the child.

\textsuperscript{212} And s 104(1)(c) of the Act which for the purposes of s 92 of COCA [relating to the Hague Convention] deems a custody order to be an order for day-to day-care and that the person with the benefit of the order is the person who has the role of providing that day-to-day care. This has the effect of ensuring that the order is one that can be invoked for the purpose of the Hague Convention where a child who is the subject of a custody order has been abducted for the purpose of the Convention.

\textsuperscript{213} And including the provision of post-permanency supports where appropriate so as to ensure that the care legacy is addressed and noting that this may take some time to manifest.
permanently removing me from my family”, the Chief Executive failed in his responsibility.214

The next chapter examines the historical context of how the State assumes a role in respect of the protection of children and the provision of care for those who cannot be cared for by their parents.

214 Possibly indicative of this is the research undertaken in respect children in care and their perceptions of their experience. See Chapter Six and the discussion about the research referred to by Nick Frost in Rethinking Children and Families: The Relationship between Childhood, Families and the State, above n 66. Also, see Atwool, above n 52, and the discussion at 106 – 126. Atwool interviewed 47 children. Of these all were still in care and there were 16 aged under 14 years and 31 over that age. Nina Biehal “A Sense of Belonging: Meanings of Family and Home in Long-Term Foster Care” (25 Nov 2012) The British Journal of Social Work <http://bjsw.oxfordjournals.org/content/early/2012/11/25/bjsw.bcs177.full> This involved interviewing a self-selected group of 29 children and their carers. Again, the group involved were all in their teens or younger.
CHAPTER FIVE

The Historical Context: Children and State Intervention

5.1 Introduction

This chapter addresses how the State involved itself in the lives of children and their families and reveals through its examination of that history, and related themes, how the State plays a legitimate role in protecting children from abuse, including, if necessary, removing them from their parents and finding new families for them. The chapter commences with a discussion of the notion of ‘welfarism’, an expression used to explain the role of the State in relation to families and how that relationship has developed. It then examines three discrete, but overlapping threads emanating from England that have become part of the fabric of the law of New Zealand. The first is the wardship and parens patriae jurisdictions. The second is the response of the State, through the Poor Law, at the issue of familial unemployment and vagrancy. The origins of this can be traced back to the sixteenth century (if not earlier) and through into the 20th century and, in England, until the advent of World War Two. The third is the reforming legislation that embraced children, (but not only children) in the 18th, 19th and early 20th centuries. The chapter concludes with the current New Zealand situation in the context of its historical legacy.

5.2 The Development of Welfarism

Since the mid-19th century the State has intervened to a significant extent in the lives of children and families. I do not explore the ideological question of parental autonomy vis-à-

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215 Eekelaar, above n 13, at 9-22.
216 There were distinct differences between the two, the consequences of which remain. Wardship began as an incident of feudal land tenure and was directed at the administration of the property of infant heirs. The parens patriae jurisdiction represented the monarch exercising the paternal role in respect of infants (as occurred with idiots and the poor and infirm). See for example Lord Cross “Wards of Court” (1967) 83(83) LQR 12; Anne McGilvray “Children’s Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada” (2011) 19 Intl J Child Rts 21 – 54; John Seymour “Parens Patriae and Wardship Powers: Their Nature and Origins” (1994) 14(2) OJLS 159-188.
217 For example, Stephen Cretney Family Law in the Twentieth Century, A History (Oxford University Press, Oxford, 2005); R Dingwall and JM Eekelaar “Families and The State: An Historical Perspective on the Public Regulation of Private Conduct” (1988) 10(4) Law & Policy 341 – 361; Fox Harding, above n 19; Hendrick, above n 78; Thomas, above n 78.
vis the State, other than to observe the reality of state intervention occurring in a wide variety of ways, whether through compulsory education, immunisation, or criminal sanction in the event of children being hit and intervention in the event of child abuse and neglect. There is nonetheless an assumption that the State has a legitimate interest in the welfare of all children and that they do not simply belong to their parents. The tripartite themes noted in the introduction to this chapter contributed to legislative changes that reflected the impact of the industrial revolution and the social and moral changes of the time. They were also influenced by the shift in discourse exemplified by, for example, the romantic revival and the evangelicals – and embodied in many respects by the ‘visible’ Victorian child. A variety of themes led to this including the need to address the moral development of children (also embracing ‘moral rescue’), relieving destitution and addressing poverty, maintaining social order and encouraging all those capable to make an economic contribution, having a strong working class available to provide men for the armed forces and ensuring that there was as little drain on the public purse as possible.

This overall theme, that of the State placing controls on the exercise of discretionary power within society and including here families (and correspondingly, as will be seen, the rights of fathers and husbands), of protecting children within society and within families, and the imposition of duties on government and local agencies to protect children and to protect workers and families, is encapsulated by the notion of ‘welfarism’. This is not the same as the ‘welfare state’ which is but a “significant manifestation” of it; being a particular way in which power over others is exercised. The welfare state:

…is usually taken to refer to centralised governmental provision for citizens welfare, originating in nineteenth-century social insurance schemes designed initially to protect

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218 See for example: the discussions in R Dingwall, JM Eekelaar and T Murray The Protection of Children (Oxford, Basil Blackwell Publisher Ltd, 1983); Dingwall and Eekelaar, above n 217; Eekelaar above n 13, at 119–120; Thomas, above n 78.
219 Thus in New Zealand, this is exemplified by the anti-smacking debate and the repeal of the law (Crimes Act 1908) of the right to use physically discipline children.
220 Thomas, above at 54, Eekelaar, above.
221 This embraced the gradual move from the dominant paternal paradigm in respect of the care and guardianship of children.
222 See Eekelaar, above n 13; Hendricks, above n 78; Thomas, above n 78.
223 Eekelaar, above. See the discussion at 10–17. This is a dynamic factor the latest manifestation being the re-focussing of public affairs by the notion of individualism being the guiding paradigm as opposed to the collective good.
224 Eekelaar, above at 11.
individuals against the vicissitudes of industrial capitalism, and moving in the mid-
twentieth century to provide education least essential cover against ill-health and
destitution on the basis of citizenship alone, all of which involves a substantial portion
of national expenditure.

Welfarism is broader than this, with the welfare state but one of its manifestations.
Welfarism "did not destroy existing social institutions, but acted through them."225 This
reached its pinnacle in the latter part of the Victorian era and early 20th century, culminating
in New Zealand with the election of the first Labour Government in 1925 and in the United
Kingdom with the election of the Attlee Labour Government at the end of the European
theatre of World War II “when optimism about democracy and solidaristic social organisation
were at their highest.”226 Welfarism had as its symbol the notion of social insurance,
encapsulated by the Social Security Act 1938 in New Zealand and, in the United Kingdom,
by the Beveridge report of 1942, whereby citizens were to be protected from the evils of
"Want, Disease, Idleness, Ignorance and Squalor."227 Welfarism embraced within its ambit
the welfare state and through everyone contributing, a more united and cohesive social
society with a beneficent government at the head would result. Welfarism remained the
conceptual spiritual force for defining how society could best operate remained until the latter
two decades of the 20th century when the disciples of neo liberalism assumed the mantle of
government in most western liberal democracies.228 Individuals, and not the State or its
agencies, were regarded as having primary responsibility for defining what their interests
were and for making those decisions. 229

In New Zealand, the legislative reforms of both the Liberal administration of the 1890s and
the first Labour Government after the 1935 election represented the operation and application
of welfarism. In this respect New Zealand was ahead of England. Both administrations were

225 At 11. For example a husband/father may have retained authority over his wife/children, but had to exercise
that power for their benefit and not against their interests. There was also a darker side to welfarism: Eekelaar,
above, n 13, observes that over the period 1852 - 1960, 100,000 young children were separated from parents
deemed by denominational "child rescue" organisations to be morally unfit to look after them and sent to
Canada and Australia.
226 Thomas, above n 78, at 54.
Parton, above n 77, at 132.
228 For example, ‘Reagansm’ in the United States, ‘Thatcherism’ in England and in New Zealand both
Rogernomics (1980s) and ‘Ruthenasia’ (1990s).
229 Eekelaar, above at 14-15. At 14 Eekelaar refers to the virtual collapse of welfarism in the face of these
changes.
keen to overhaul what they saw as outmoded social structures and each were imbued with a
degree of optimism about the future, including the hope that measured and significant
improvements could be made to the lives of children and families through careful and
professional intervention. Welfarism remains a current feature in the New Zealand body
politic albeit with the State having, since 1984, pulled back from the outer limits of its
previously perceived role of being at the heart of society. The Act, albeit in part through
its dual philosophies of intervening to protect children and emphasising family responsibility,
stands as a symbol of the dynamism of welfarism.

Welfarism exemplified the State’s involvement in family life and restructured the pre-
Enlightenment exemplar of families being left to regulate themselves with the father/husband
being dominant and the wife/mother and any children being subservient, and with
fathers/husbands being constrained by morality and not by law. In that pre-enlightenment
paradigm women and children, as subordinate family members, were in a legal relationship
intended and designed to enhance the interests of the father/husband as the dominant member
of that family. This was a microcosm of the world at large; the King had domain over

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230 See Chapters Seven and Ten for discussion of this dynamic.
231 The Act, when analysed, represents an amalgam of different perspectives of which welfarism is but a part
through the notion of intervention to protect children. Given the need for the State to be seen as a protector of
children when they are abused or killed, it is unlikely this will change. However, in other areas of life the State
is questioning the legitimacy of its role in being overly in the lives of citizens. On the one hand this is reflected
by the current (2011-2013) reform of the Family Court and the view that the State has a limited role in resolving
private family disputes and, at a more local level with the debate of fluoridisation of water by local authorities
(2013): is there a public good in putting fluoride in drinking water so that the community as a whole will benefit –
the greater good argument? Or is it a personal and family responsible to look after dental wellbeing of one’s
children?
232 The Enlightenment was the intellectual movement that swept across Europe in the late 17th century and into
the 18th century. Reason and individualism were emphasized as opposed to tradition. Pearsall, above n 25. See
also Eekelaar, above n 13, at 10-11. The Enlightenment wrought significant change in society. These were the
most profound political, social, and cultural changes of their time, and which at their most concrete expression
saw the end of absolute monarchy in England and France, through the revolutions of 1688 and 1789
respectively. It was a time when technological advances saw newspapers and journals being produced and read
in greater numbers than ever before: questions began to be asked for example, about the role of slavery in
society; of what were the appropriate conditions in which children (and indeed adults) could be expected to
work; about whether the voting system should be expanded and who should be able to vote; of the respective
roles that men and women play in society; of the benefit to society of having both healthy and educated
children; and of what is the appropriate response to children who are criminal and delinquent or children who
are abused and ill-treated.
233 On marriage, the wife’s property became that of the husband; he had guardianship and therefore legal control
over the children of the marriage; the father's legal interest in his children was in their labour. In return, there
was an expectation that the father/husband would look out for the interests of his wife and children.
234 The discussion here is centred on the English body politic, being the source of that of New Zealand. Similar
events and outcomes occurred elsewhere in Europe, but with the French Revolution a century later being the
his subjects and was expected to behave benevolently with there being no legal restraint on kingly authority. The Revolution of 1688, the removal of James II and the passing of the Bill of Rights Act began a process whereby a king could only legitimately exercise power if that occurred having regard to the interests of his subjects. This ended the royal claim of ruling by prerogative right. Parliament sovereignty came to the fore leaving the Crown with only residual prerogatives. In parallel with this was the passing of the absolute right of the father/husband over his wife and children. Fathers were expected to support their families, and families were seen as requiring support from the State, with legislation being passed to impose duties on public authorities regulating the social and working conditions in which families lived, parents worked and the welfare of children protected.

5.3 Wardship and the parens patriae jurisdiction

The parens patriae and wardship jurisdiction(s) date from the Middle Ages, their origin being “lost in the mists of antiquity”. However, the genesis of the jurisdiction as a vehicle for providing for the welfare and protection of children, in the sense that those terms are used today, is a more recent evolution being a "gradual process of historical osmosis by which parens patriae principles filtered into and became accepted as principles of common law and equity." The jurisdiction remains alive in the 21st century, providing a vehicle to protect children from a variety of potential harms, generally excluding care and protection issues that most profound. The events in Europe of 1848 when revolutionary movements crystallised in a ferment of political upheaval reflect this as well.

235 Joseph, above n 67. At 204 Joseph notes that “it established and confirmed the supremacy of the rule of law in a way no ordinary statute could have done.

236 In this respect the constitutionally important case of Entick v Carrington (1765) 19 St Tr 1029, which held that trespass by the State could not be excused by either State necessity nor prescriptive usage, provides a useful example of the interaction of the common law, parliametary sovereignty and the claim for executive monarchical power.

237 Cross, above n 216; Seymour, above n 216.

238 Sir Henry Theobald The Law Relating to Lunacy (Stevens and Sons Ltd, London, 1924) cited by the Supreme Court of Canada in Eve v Eve 31 DLR (4th) 1 [1986] 2 SCR 388. (Supreme Court of Canada, (at paragraph 32). In the same paragraph, the Court went on: “De Prerogativa Regis, an instrument regarded as a statute that dates from the thirteenth or early fourteenth century, recognized and restricted it, but did not create it. Theobald speculates that "the most probable theory [of its origin] is that either by general assent or by some statute, now lost, the care of persons of unsound mind was by Edw. I taken from the feudal lords, who would naturally take possession of the land of a tenant unable to perform his feudal duties."

239 And as opposed to the protection of the property of the child.

240 Inglis, above n 183, at 227 - 228.
are otherwise embraced by the CYPF Act. Wardship is both an effective, and very often the only, remedy to new and unforeseen problems that arise in respect of children.

5.3.1 Historical origins of the jurisdiction

The Sovereign, being the fount of justice, had the “power to mitigate and supplement the law”, and to provide, where appropriate, “‘special remedial justice’.” By the 14th century there was an established form of equity that allowed the King to provide remedies where necessary. This jurisdiction, representing the embodiment of the Monarch’s parens patriae powers, translated as ‘parent of the nation’ was delegated to the Lord Chancellor and the Court of Chancery. The Monarch owed a duty, as a component of the prerogative, to the weak, the poor, the mentally disordered, and to children, being groups unable to obtain redress from the ordinary court. Wardship was how the parens patriae jurisdiction was exercised. This procedure was put in place if a child was orphaned and the State had to replace that parent by providing for the proper administration of the property of the child and for his or her upbringing.

This effectively resulted in exploitation of the child’s property, for if the heir was orphaned, wardship permitted the lord of the estate to be entitled to the profits derived from the lands of the child-heir. Although its original function was to protect the property of the infant, this

241 See Tipene v Henry [2001] NZFLR 967. Here, the children had been placed under the guardianship of the Family Court, now codified within COCA. The issue was whether the concerns that had led to that action being taken were better dealt with under the umbrella of the CYPF Act as opposed to the wardship jurisdiction. The Court held that it was. Paragraph (1) of the footnote illustrated the conceptual distinction between the two statutes. "Parliament has provided a variety of means to protect the welfare of children. The Guardianship Act [now the Care of Children Act] prescribes ways of dealing with disputes between guardians, and provides for the appointment of guardians and custodians. Where children are in need of care and protection, the Children, Young Persons and Their Families Act prescribes a process of social work, assessment, and whanau consultation that may lead to informal resolution, social work assistance, or Court determination." See also B v Family Court HC Wanganui CIV 2008-483-32, 2 June 2009; WAH v WTW [2010] NZCA 577.


243 Spence The Equitable Jurisdiction of the Court of Chancery (1846) Vol 1 at 77, cited by Seymour, above n 216, at 167.

244 Vinogradoff (ed) Essays in Legal History (1913) 286 at 290, citing Pollock “The Transformation of Equity” 286 at 290, in Seymour, above n 216, at 167.

245 Cross, above n 216; Anthony Graham “Parens Patriae Past Present and Future” (1994) 32(2) Fam & Concil Cts Rev 184; Inglis, above n 183, at 79; Seymour, above n 216, at 89.

246 Graham, above; Inglis, above.

247 Seymour, above, at 89.

248 Graham, above; McGilvray, above n 216; Seymour, above.

249 Seymour, above, at 89.

250 Graeme Austin Children: Stories the Law Tells (Victoria University Press, Wellington, 1994). See also Dingwall and Eckelaar, above n 217, at 345 where the comment is made that “[F]or ordinary people, the value
inevitably occurred only in a small number of cases, where the property was substantial. 251

In England, prior to the reign of the Tudors, 252 land was held either by the King or by his tenants-in-chief. 253 When a tenant-in-chief died, his heir would inherit. If the heir was a minor this could not occur; this was circumvented by the King becoming the guardian of the heir and being entitled to the profits during the period of minority. Henry VIII established the ‘Court of Wards’ in 1540, whose function was the enforcement and administration of the rights of the Crown in respect of wardship. 254 The obligation of the King was to maintain the heir and to educate him or her. The income derived from administration of the estate of the ward was “considerable” 255 and “in the light of this attitude on the part of the Court it was not surprising to find that the ward of the 18th and 19th centuries was a wealthy orphan.” 256

The question is why and how did the parental jurisdiction emerge? The concepts of wardship and guardianship that developed from the changes in the character of land tenure did not arise through the recognition of the duty to “nurture and protect children.” 257 However, by the beginning of the 15th century the Court of Chancery was exercising jurisdiction over infant heirs 258 and confined either to the resolution of disputed custody claims or to the management of their property. By the time of Elizabeth I’s accession to the throne in 1558, the Court was exercising jurisdiction over common law guardians of infants who could be compelled to account for the management of the infant’s property. Where necessary, they were removed.

of property would seldom have been sufficient to justify the costs of litigation. Orphans would have been forced into local households which needed extra labour or by religious orders seeking possible recruits.”

251 NV Lowe and RAH White Wards of Court (Butterworths, London, 1979). Lowe and White noted the Report of the Committee on the Age of Majority, Cmnd 3342, (UK) which observed that to understand wardship it was necessary to understand the exploitative aspect of the procedure (at 5). Cross, above n 216, notes the last remnant of this approach to come before the High Court of Justice being In re Agar-Ellis 24 Ch.D. 317, where a father sought to enforce his legal rights as father over his daughter and as husband over his wife. The approach of the Court in that case, the high watermark of the paternal rights paradigm, reflected the Court having an extreme reluctance to interfere with the discretion of the father and the “responsibility of exercising... power which nature has given him by the birth of the child.”

252 Henry VII, the first Tudor King ascended the throne in 1485 after defeating Richard III at the Battle of Bosworth Field.

253 This was an incident of Knight Service, also referred to as “military tenure.” It was clearly exploitative in aspect.

254 The duration of wardship in respect of a male heir was until he attained the age of twenty-one years; in the case of a female the duration was unclear, being either twenty-one years or ceasing when the ward reached fourteen years. Seymour, above n 216. The Crown could in this way get possession of ancient feudal dues to the Crown and increase the Crown’s income

255 Cross, above, at 200.

256 Cross, at 202.

257 Seymour, above, at 165.

258 Albeit as a matter of practice because of the property question.
However, the precise ambit and extent of the jurisdiction of the Court of Chancery was not clear.\textsuperscript{259}

The abolition of the Court of Wards in 1656\textsuperscript{260} and then of feudal tenure (and feudal wardship), by the Tenures Abolition Act 1660, saw the development of the notion of guardianship as we now know it.\textsuperscript{261} With abolition went the right of the King to the profits of the land of the infant heir. Socage tenure, being the feudal tenure of land involving payment of rent rather than non-military service, was now predominant.\textsuperscript{262} Heirs to such tenants came of age when they turned 14 years and could choose their own guardians, a perceived untenable outcome given the danger of an unwise choice being made.\textsuperscript{263} The Tenures Abolition Act addressed this by allowing fathers, by deed or will, to appoint a guardian for their child until the age of 21 years was reached. The duty was now to account to the heirs as to the administration of the property. This was a fiduciary relationship. That duty to account to the ward in respect of revenue/profits was a feature of socage tenure and, in contrast to military wardship, which had been a source of revenue. Protection of the interests of the ward was now the essential feature of the jurisdiction.\textsuperscript{264}

5.3.2 The Court of Chancery

Holdsworth’s \textit{A History of English Law} observed that the law relating to guardianship was defective and therefore inadequate as it fell between two stools. The older view was that it existed for the benefit of the guardian while the new perspective considered that it was for the benefit of the child and with responsibilities owed to the child.\textsuperscript{265} This led to the expansion of the jurisdiction of the Court of Chancery in respect of infants who, being incapable, came

\textsuperscript{259} Seymour, above n 216, at 166.
\textsuperscript{260} The Court of Wards, set up in 1540, enforced the lord's rights of wardship and marriage which had existed, since the Norman Conquest, as feudal incidents. The purpose of the Court of Wards was to enforce payment of these ancient feudal dues to the crown and thus to increase the income of the king. <http://www.answers.com/topic/court-of-wards downloaded>. See also Seymour, above 216, at 89.
\textsuperscript{261} Seymour, above.
\textsuperscript{262} Pearsall, above n 25, at 63.
\textsuperscript{263} Seymour, above.
\textsuperscript{264} Seymour, above.
\textsuperscript{265} Thomas Holdsworth \textit{A History of English Law} (Vol III) at 512, cited by Seymour, above. The older view was said to have held sway.
under the *parens patriae* umbrella and, therefore, subject to royal protection.\(^{266}\) The full extent of the jurisdiction was enunciated by Lord Somers LC in *Falkland v Bertie:*\(^{267}\)

In this Court there were several things that belonged to the *King* as *pater patriae,* and fell under the care and direction of this Court, as charities, infants, idiots, lunatics etc. Afterwards such of them as were of profit and advantage to the King, were removed to the courts of Wards by the statute; but upon the dissolution of that court came back to the Chancery.

Although property remained the vehicle for bringing a case to Chancery, the jurisdiction was no longer necessarily related to the property of the child, and where property was severed, the jurisdiction became prospective rather than retrospective.\(^{268}\) This was explained in *Wellesley v. Duke of Beaufort*\(^{269}\) where it was established that the jurisdiction over children was necessary for their protection and education, and where it was said in respect of the *parens patriae* power:\(^{270}\)

\[... it belongs to the King as *parens patriae,* having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them.\]

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\(^{266}\) The question of precisely how the jurisdiction over infants did emerge nonetheless remains a matter of intellectual debate. Seymour, above n 216, at 168 - 172. See also Stewart Bartlett “Wardship - the first resort or the last resort” (2003) 4 BFLJ 133. Bartlett -notes the abolition of the Court of Wards and then refers to the somewhat “mysterious fashion” in which the Court of Chancery which no doubt “abhorred the vacuum”, took up the reins (at 133).

\(^{267}\) *Falkland v Bertie* (1696) 2 Vern 333 at 342; 23 ER 814. However, Seymour, above n 216, at 137 asserts that Lord Somers “plucked” the power from their air as he gave no authority for the proposition he enunciated in *Falkland v Bertie.*

\(^{268}\) McGillvray, above n 216. See Lord Cottenham in *re Spence* (1847) 2 PH 247 at 251; 1 Ch 143 at 147. “[T]he cases in which the Court interferes on behalf of infants are not confined to those in which there is property.” However, the final link to property was not severed until the passing of the Law Reform (Miscellaneous Provisions) Act 1947.

\(^{269}\) *Wellesley v. Duke of Beaufort* (1827) 2 Russ 1, 38 ER 236, per Lord Eldon. This was a case providing a useful illustration of the nature and extent of the jurisdiction. Lord Eldon went on to emphasise that the jurisdiction had been exercised for the maintenance of children solely when there was property, not because of any rule of law, but for the practical reason that the Court obviously had no means of acting unless there was property available, which could be applied for the use and maintenance of the children. Wellesley was an extremely dissolve and objectionable father due to his philandering ways and vulgar language - in the vernacular of the time - in spite of his birth. He waged a lengthy Court battle to gain custody of his children following the death of his estranged wife who had entrusted the care of the children to members of her family. The case went on appeal to the House of Lords. *Wellesley v Wellesley* (1828) 2 Bli NS 124, 4 ER 1078. There the Court confirmed that the jurisdiction extended to and beyond children. The jurisdiction over children had been adopted from that applicable to those having mental incapacity, extending “as far as is necessary for protection and education.” 2 Bli At p 136, 4 ER at 1083

\(^{270}\) In the 38 ER report at 243.
By the 19th century it was accepted that the origin of the jurisdiction lay in the duty of the Sovereign to protect those of his subjects, particularly children, who were unable to protect themselves. The existence of the jurisdiction was sufficiently entrenched for it to be described as:

… essentially a parental jurisdiction … it involves … the main consideration to be acted upon in its exercise is the benefit or welfare of the child … welfare in this connection must be read in its largest possible sense, that is to say, as meaning every circumstance must be taken into consideration, and the Court must do what under the circumstances a wise parent acting for the true interests of the child would or ought to do.

Nonetheless, by the beginning of the 20th century there were still few children who were subject to orders for wardship, and the role of the Court of Chancery was still to protect wealthy orphans and their property as the Court could still not take on for itself “the maintenance of all the children in the country.”

5.3.3 Further development of the jurisdiction

The actual details of cases involving the jurisdiction are not relevant for present purposes. Rather, what is important is the way in which the law developed and came to be seen as a vehicle for the protection of children. The development of the jurisdiction has been gradual. In 1971 in the United Kingdom, there were only 60 applications being made to place children under the wardship of the Court. By 1991 there were 4,791 applications. The reason advanced for this increase was the perception that the jurisdiction was there to resolve all kinds of disputes over children and “not so much a refuge for orphaned heiresses and a bulwark against predatory adventurers.” The jurisdiction was inherently flexible with the only test being the Court’s perception of the best interests of the child, and pragmatically,

271 Cretney, above n 217; Lowe and White, above n 251.
272 R v Gyngall [1893] 2 QB 232 at 239 per Kay LJ. Lord Esher in same case described the jurisdiction as one where Chancery, on behalf of the Crown, acts in a judicially administrative way as the “guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent.” See also the case of In the matter of RSR [2005] NZFLR 228, where Keane J in a thorough analysis of the wardship jurisdiction accepted the correctness of the dictum enunciated in R v Gyngall.
273 Cretney, above.
274 Wellesley v Beaufort, above n 269, per Lord Esher.
275 Although by 1992, the number of applications had dropped to 492. Cretney, above n 217, at 584. To bring an application there still needed to be property attaching to the child which could be used for the use and maintenance of that child.
reflecting difficulties with the then applicable legislation, the Children’s Act 1975. The Children Act 1989 led to a significant decrease in applications as it amended both public and private law so that appropriate arrangements could be made to protect children, and to make arrangements for their placement and for contact with them. There was no longer such a need to use the jurisdiction. By the late 20th century, the jurisdiction had moved from being parental in nature to embracing powers that were more expansive than those possessed by a parent – as indicated by the observation in Re R (a minor)(wardship: medical treatment): [T]he practical jurisdiction is wider than that of parents … [T]his jurisdiction is not derivative from the parents’ rights and responsibilities, but derives from, or is, the delegated performance of the duties of the Crown to protect its subjects and particularly children.

5.4 New Zealand and the guardianship (wardship) jurisdiction

In New Zealand the jurisdiction remains extant. It is protective, going beyond the protection of children to embrace the elderly, the infirm and those suffering from mental health or intellectual disability. This power was inherited by the High Court along with all of the perquisites of executive government when New Zealand was established as a colony. The jurisdiction is exercised jointly by both the High and Family Courts through s 34(2) of COCA. The power is still colloquially referred to as ‘wardship’ - with the child being a ‘ward’ of the Court’ or as being under the ‘guardianship’ of the Court. The term parens patriae is also invoked to describe the jurisdiction, reflecting its non-statutory origins. However, the actual parens patriae jurisdiction has now been largely (if not wholly) subsumed by the statutory provisions set out in COCA. Although still exercised on a

277 Cretney, above n 217, at 588; Dingwall, Eekelaar and Murray, above n 218, at 10-11. The jurisdiction was invoked in a myriad of fact situations: parents disapproving of their teenage child’s lifestyle; when a child was at risk of being removed from the country by an estranged parent; by caregivers (foster parents, grandparents, prospective adopters) to prevent the removal of a foster child from their care; when medical care a child might require was in dispute; and particularly by local authorities using the jurisdiction to protect children rather than use the provisions of the Children’s Act 1975. Relevant provisions of this were not brought into effect until 1985 and 1988 (relating respectively to custodianship of children by local authorities and to a comprehensive adoption service).
278 Cretney, above.
279 Re R (a minor)(wardship: medical treatment) [1991] 4 All ER 177 at 186, per Lord Donaldson MR.
280 Inglis, above n 183.
281 Joseph, above n 67.
282 See the decision in W v DGSW (1991) 5 FRNZ 671 (HC) at 676.
283 Inglis, above; R Ludbrook and L de Jong Care of Children in New Zealand: Analysis and expert commentary (Thomson Brookers, Wellington, 2005).
regular basis, but sparingly, the power is not used other than in relatively rare instances. It remains a valuable remedy, capable of being invoked in the particular circumstances of any case for the protection of a child “which in other forms of procedure are not so readily or urgently available.” The principles of the jurisdiction are said to be persuasively influential and have become embedded in the practice and procedure of the Family Court. The jurisdiction appears to be used more often in New Zealand than in England and Wales. The focus in New Zealand, other than in cases of children requiring blood transfusions, is where the Chief Executive has failed to address the care and protection situation of a child with sufficient alacrity. The applicant is most likely to be the lawyer appointed to represent the child. These cases generally go unnoticed as they are part of the progress, as opposed to the outcome, of a case.

5.5 The Poor Law

The second historical theme is that of the response of the State to the situation of neglected and destitute children. This manifested itself in the Poor Law in England, a variant of which came to New Zealand in the 19th century with the colonists of the time. The enactment

284 Inglis, above n 183.
285 For example, where a child is at risk of abuse and where intervention will (or should be) occurring under the CYPF Act and it is not. Blood transfusion cases continue to use it on a regular basis. It is not used to control the wayward teenager or to keep aged lotharios away from naïve young women.
286 Inglis, at 468.
287 Inglis.
288 Where the High Court is prepared to place far less restrictions on and to accept the appropriateness of the exercise of statutory discretion by social workers. Bartlett, above n 266.
289 Where a medical professional will apply for an order in a situation where a parent for religious reasons is refusing to give consent to that transfusion occurring.
290 The lawyer for child must seek leave of the Court to make the application. This in itself may provide the basis for the Court to examine the issue in depth and gives the Chief Executive the opportunity to reflect on what is proposed. Situations may involve the placement of a child out of the area where family may be located or where there has been too much interviewing of a child and a risk of systems abuse may be present. The lawyer also runs the risk of then becoming a party to the proceedings. See Bartlett, above n 266.
291 In this thesis I refer to the ‘Poor Law’ as opposed to the ‘Poor Laws’. There were a number of ‘Poor Laws’. For example, there were the initial sequence of laws passed between 136 and 1601 (Dingwall and Eekelaar, above n 217) and by way of example, there were the Poor Law Acts of 1889 and 1899 (which were intended to deal with the issue of parents reclaiming their boarded out child who was old enough to work and earn wages. The boarded out child had been abandoned by its parents and placed in foster care (Cretney, above n 217). As noted in the text, the first was introduced in the eras of the Tudors and remained in that form until the early 1830s. The Poor Law worked reasonably well through the 17th and 18th centuries. However, as the population increased the system began to show signs of stress, coupled with indications of the system being abused. This applied in both rural and urban areas. In 1832 the Government established the Royal Commission on the Poor Law. This led to the introduction of the New Poor Law in 1834, coming into effect in 1835. The 1834 Act required that relief only be given within the workhouse. This led to immediate issues for children as they could no longer be apprenticed out. This led to amendment in 1844. See Cretney, above, at 635-636; Simon Fowler Workhouse: The People, The Places, the life Behind Doors (The National Archives, Kew, 2007).
of the Poor Law was another manifestation of the development of the welfarism paradigm as the State increasingly became involved in the lives of families and of children.\textsuperscript{292} The reality of life in pre-industrial England was such that dependant citizens were numerous – the young, the old, the sick, the crippled, the mad, and the simple. In the absence of someone who could provide support, that duty was collectivized, initially through the church and later through the Poor Law as implemented between 1536 and 1601.\textsuperscript{293} The Poor Law legalised the formal moral duty of fathers to support their children.\textsuperscript{294} Equally, the Poor Law represented the attempt by the State to both manage the poor (the working classes) without it costing too much\textsuperscript{295} and to manage the risks manifested by indigent and delinquent children.\textsuperscript{296}

The history of state care in England and Wales is usually recounted from the 17\textsuperscript{th} century onwards, with little being known about the level of assistance and support for neglected or destitute children in the Middle Ages. For many, the enduring image of the Poor Law is the workhouse with its child and adult inmates – the latter being the destitute parents and the overseers. This is illustrated by many instances of 19\textsuperscript{th} century literature, as exemplified by Charles Dickens in Oliver Twist. However, the workhouse preceded Dickens by some 200 years, having originated in Tudor England following the dissolution of the monasteries. This heralded a community response, as opposed to one from the State,\textsuperscript{297} with the Church playing the key role in looking after unwanted children.\textsuperscript{298} In Tudor England, destitute children were sometimes regarded as “children of the State”\textsuperscript{299} and a potential asset, although

\begin{footnotes}
\item[293] Dingwall and Eekelaar, above n 217.
\item[294] Eekelaar, above at 119. (This occurred when the “social turbulence of the 16th century disturbed the expectation that father’s would meet their moral duties of supporting their children.) See also Dingwall and Eekelaar, above n 217, at 344: “If a single woman had a child... the parish authorities would try to make its support an obligation on a putative father rather than giving poor relief. The State’s investigation of family life is not a nineteenth century innovation”.
\item[295] Each parish was responsible for looking after those who were too ill, young or old to work. The cost came from a tax or rate on the property of the wealthy of the parish. Fowler, above, n 291, at 13.
\item[296] Hendrick, above n 78, and Thomas, above n 78.
\item[297] Thomas, above n 78, at 70.
\item[298] Nissim, above n 292. It was also common for more affluent families to look to place their children in families of a higher social status: where this occurred, and the families were poorer, this could also be an opportunity for work, and for having the cost of raising a child borne elsewhere. This was in contrast to children who were propertied and who would be embraced by the \textit{parens patriae} jurisdiction.
\end{footnotes}
clearly differentiated from children maintained by their families. Workhouses were administered in each parish to prevent the destitute from starving. Two fundamental beliefs that led to their establishment: firstly, that poor parents wanted to get rid of their children (something which was to be discouraged) and, secondly, that mothers of illegitimate children deserved to suffer for their sins. This meant that conditions were very harsh and offered little chance of rehabilitation for either the adults or the children.

The Elizabethan Poor Law of 1597 removed a “safety net for the very poor”. It was enacted at a time of social and economic dislocation when there was a perceived threat to the established social order from children: being raised by vagrant, dissident or criminal parents or who were learning false values. Children who grew up in the workhouses were often emotionally and physically unfit, receiving no education or training and very little nurturing. They were fostered out in return for free labour or apprenticed to artisans. Poor Law children, usually orphans or those abandoned by their parents were apprenticed out to whoever would take them. The boarding-out system lasted until the passing of the Poor Law Amendment Act 1834 (the New Poor Law). Outside apprenticeships were rejected by the Poor Law Guardians in favour of industrial training and education that would be delivered in buildings separate from the workhouse. The proclaimed aim of the new system was the desire to educate children for independence, for employment and for Christian adulthood. For adults to obtain poor relief they had to enter the workhouse where severe conditions were

300 Dingwall, Eekelaar and Murray, above n 218.
303 This was a time of significant unemployment. There had been rapid transformation from intensive subsistence agriculture to capital-intensive production, and with this occurring at a time of real and perceived civil unrest. Dingwall, Eekelaar and Murray, above.
304 Dingwall and Eekelaar, above n 217; Dingwall, Eekelaar and Murray, above.
305 Queen Victoria was said to have asked Lord Melbourne if he could recommend Oliver Twist (serialised in 1837 – 38). He did not want to read it he said because “It’s all among the workhouses and Coffin Makers and Pickpockets ... I don’t really like these things; I wish to avoid them; I don’t like them in reality, and therefore I don’t wish to see them represented.” AN Wilson The Victorians (Hutchinson, London, 2002) at 28.
306 Cretney, above n 217; Griffiths, above.
307 Hendrick, above n 78.
308 Cretney, above; Hendrick, above; Nissim, above.
imposed, with husbands and wives being separated and children separated from their parents, although they all resided in the workhouse.\textsuperscript{309}

The (New) Poor Law regime system resulted in large district schools being established, some of which had over 1000 pupils. These were subject to the criticism that they were detrimental to character formation and to academic performance. Boarding-out or fostering had, by the time of the 1870s onwards, again become the preferred means of providing for neglected and destitute children in England, although the provision of care through the vehicle of schools continued.\textsuperscript{310} The children were usually illegitimate or motherless orphans, who had been abandoned, and children whose parents were imprisoned or deemed insane. The Poor Law Board Order 1870 selected these groups as they were regarded as children without a family. This was a process occurring in both England (and the United States of America) through the involvement of voluntary societies influenced by a Christian ethos that had already manifested itself by way of a general anti-cruelty movement sweeping middle-class society.\textsuperscript{311} These societies (for example, Dr Barnardos, the National Children’s Home, National Society for the Prevention of Cruelty to Children, and the Waifs and Strays Society, amongst many) housed their children in institutional homes, boarding-out (otherwise fostering), cottage homes and emigration schemes. By the end of the 19\textsuperscript{th} century the various approved\textsuperscript{312} voluntary societies/philanthropic institutions to provide care for indigent children, had secured rights to keep children against the wishes of their parents.\textsuperscript{313} By 1905 Barnardos had 11,277 children in its care.\textsuperscript{314} Once these children were placed, the severance of the child from any connection with his natural family was regarded as crucial for the success of the policy. This was in contrast to those children who remained within their

\textsuperscript{309} Cretney, above n 217, at 636. The Poor Law Amendment Act of 1844 ameliorated this by providing for children to again be apprenticed/boarded out.
\textsuperscript{310} Cretney, at 639.
\textsuperscript{312} By the Poor Law Board.
\textsuperscript{313} Hendrick, above n 78.
\textsuperscript{314} Hendrick. At 76 Hendrick observed that between 1900- 1914 there were probably between 70,000 and 80,000 children in residential care in the United Kingdom. Most were in the general wards of workhouses. All children passed through these on their way to specialist institutions. These latter organisations were the district and separate schools which housed around 12,000 children. There were a further 5000 children in scattered homes and 8,500 in group homes, both which were attempts made at creating family environments for those placed children. There were also between 10 and 15,000 children placed in voluntary and society homes which were paid for by the Poor Law guardians with boarding-out arrangements accounting for another 10,000 children.
families: the Poor Law Board Order 1870 emphasised the need to otherwise avoid severing or weakening in any way the ties of the family.315

Hendrick refers to Poor Law children occupying “a transitional position between the State as the arbiter of rescue, reclamation and protection, and as the provider of services to children as publicly recognised citizens of the future.”316 This was coupled with the influence of the evangelicals and the voluntary societies who wanted to save children from moral corruption. Children were therefore removed from their families with this being sanctioned by the Poor Law Amendment Act 1889 authorising guardians to remove children of the poor into the care of the guardians. The guardians assumed, as a matter of law, rights over these children until they turned 18 years old. This was a power exercisable by resolution and not by judicial intervention in the first instance. There was, however, a right of appeal to the Magistrates Court but there was no obligation to advise parents of this. The children were then fostered out. By 1908, over 12,000 children had been placed in this way.

However, many placements occurred informally. Parents were able to give their children away to relatives, friends or strangers without losing either their rights as parents or relinquishing their obligations that arose by virtue of that status.317 It was the legal, economic and social stigmas attached to illegitimacy that often led to children ending up under the Poor Law.318 This “uprooting” power was later transferred to local authority social services, and extended and used, until removed by the Children Act 1989.319

The Poor Law guardians were initially charged to put the children of the poor to work so that they could be of benefit to the greater society. They subsequently acquired duties to care and educate such children.320 By the end of the 19th century, part of the rationale for the Poor Law was the need to rescue children who were destitute or who had been abandoned. Children were now increasingly seen as “victims who were not to blame for their plight; it was

315 Hendrick, above n 78.
316 Hendrick. In contrast Cretney, above n 217, at 631 says that by the end of the 19th century Barnardos had in his charge over 4,700 children.
317 Hendrick.
318 Adoption was formalised in 1926 by the Adoption of Children Act 1926 (UK). This became a vehicle to address the issue of children who for whatever reason are either temporarily or permanently without a parent.
319 Eekelaar, above n 13, at 12.
320 Eekelaar.
desirable to provide good and even tender care for them.” Nonetheless, children of the poor were still seen as threats and viewed with distaste, with their being many, including those in the evangelical/reforming societies who thought it better that such children were better employed in a cotton mill or a factory as opposed to being out of control of their parents and running uncontrolled through the streets and drifting into lives of vice and crime. An official giving evidence at the 1909 Royal Commission on the Poor Law opined that such children:

...have as a rule been neglected and subjected to bad examples in such moral faults as dishonesty, intemperance, idleness, lying and the like, and the re-shaping of their character needs expert handling.

There was an ultimate contradiction in the way in which the Poor Law functioned. Its success was dependent upon people approaching and entering it, but it operated under the principle of deterrence. Rather than face the breakup of the family on entering the workhouse, most tried to survive without doing so, but found that their children ended up in the streets. Nonetheless, despite the apparent contrast between the Poor Law institutions and those established by the philanthropic voluntary societies, they uniformly promoted the policy whereby children in need were never rehabilitated back to their parents and families.

There was also a gradual move on the part of social policy makers to focus on the emotional needs of children. By the end of the 19th century efforts were being made “to give the child

321 Thomas, above n 78, at 75. Cretney, above n 217, at 632, also notes the ‘baby farming’ phenomenon. All too often a mother who was unable to support her child gave up that child for ‘adoption’. This was to a ‘baby farming house’. The child would be ‘cared for’ in exchange for a monetary payment. These children were often abused and neglected and usually died in short order. In England this led to the Infant Life Preservation Acts of 1872 and 1897, which Hendrick at 46-47 says were failures in both conception and practice. In New Zealand, baby farming was not unknown and for the same reasons of social stigma (the other side of moral evangelism). Minnie (Williamina) Dean is the most notorious. Between 1889 and 1895, 26 children, of whom at least six died, passed through her hands. Others instances were in Auckland (Mt Eden) in 1881 and Wellington (Newlands) in 1923 when four infant skeletons were dug up in a back garden. The illegitimate infant death rate was much higher than the legitimate. James Belich Paradise Reforged: A History of the New Zealanders from the 1880s to the Year 2000 (The Penguin Press, Auckland, 2001) at 184.

322 Cretney, above n 217, at 629; Dingwall and Eekelaar, above n 217.

323 Hendrick, above n 78, at 78.

324 Hendrick, at 79. Hendrick is here referring to the contrast between the voluntary societies such as Barnardos. He refers to the societies and their religious motivation and to the drive to rescue and save the children of the poor – both from their appalling living conditions and from their parents.

325 Hendrick.
more individual care and some sense of belonging to a community.” Thomas comments that the:  

… modern concern with the welfare of all children, rather than simply the destitute, may be linked to the twin developments of political democracy and mass armies at the end of the nineteenth and beginning of the twentieth century. Political democracy produced concern with the development of children's minds; the demand of warfare with their bodies. As result it became important for the State to concern itself with what went into both: with education on the one hand, and health and nutrition on the other.

The Children and Young Persons Act 1933 (UK) imposed a statutory requirement to consider the best interests of the child. Its purpose (in part) was to "make further and better provision for the protection and welfare of the young and the treatment of young offenders”. This statute forged a close link between the care of delinquent and neglected children in the work of local education authorities. It defined both wilful cruelty and wilful neglect of children as criminal offences. The child could be brought before the Juvenile Court to receive care or protection. Importantly, that Act directed attention to the provision of care that was to be given to homeless children in voluntary homes and orphanages, including the inspection of those premises by the Home Office. In practice, however, this still meant finding a fit person to replace unfit parents.

World War II and the social change that accompanied its end saw the demise of the Poor Law. This came with the passing of the Children Act 1948. The aim of care was to now give children a substitute family life with state care and state sourced services as close as possible to what they would have had had they not been removed from their families. The Act was an attempt to provide a coherent and centralised structure for all homeless children. Nonetheless, it maintained its connection to the Poor Law. Under it, provision continued to be made for the ‘voluntary care’ of children. Such children could not be

327 Thomas, above n 78, at 54.
328 Hendrick, above n 78, at 183.
329 Hendrick,
330 Thomas.
331 Nissim, above n 292, at 257.
332 Nissim, above.
333 Hendrick, above n 78.
removed from their homes against parental objection. Local authorities continued to have the duty to receive and care for children who had been orphaned or deserted, or whose parents were incapable (whether for physical, mental or moral reasons) of looking after them. The children were no longer placed in the workhouse; instead the State assumed responsibilities in the capacity of a residual caretaker.334

5.5.1 Life for children under the Poor Law

Life for children in the workhouses and reformatories in the 19th century was gruelling. The ostensible aim was to produce useful citizens, but as little investment was directed to this purpose neither the workhouses nor the reformatories were particularly successful in achieving that goal.335 Violence and abuse were endemic. Hendrick refers to the "sheer scale of the legal violence to which the children were subjected as a matter of routine."336 Institutions were infamous for their discipline, and where young people were the inmates this nearly always meant corporal punishment (and sexual abuse), with one description of a 19th century institution having:337

… neatly gathered all of the troubling and messy aspects of child abandonment away from view, off the streets, under institutional supervision. Behind their walls, paid officials dealt with Society’s loose ends, and neither the parents who abandoned them, or their fellow citizens had to devote any further thought or care to these children.

The situation in New Zealand’s industrial schools was no different had had strong punitive aspects to them - "institutional life was grim and lonely for many of the residents who lost contact with family and friends."338

5.6 Reforming Legislation

The third theme of this chapter is that of reforming legislation. This reflects the themes and philosophies that underpin the mores of society at any given time and incorporates the

334 Dingwall and Eekelaar, above n 217.
335 Thomas, above n 78.
336 Hendrick, above n 78, at 77.
338 Dalley, above n 311, at 16.
notions and perceptions of what a society represents as its goals. Waller referred to this in the context of what constitutes the ’social problem’: 339

The term social problem indicates not merely an observed phenomenon but the State of mind of the observer as well. Value judgements define certain conditions of human life and certain kinds of behaviour as social problems: there can be no social problem without a value judgement.

The Poor Law can also be set within the paradigms of both social control of the poor and, to a lesser extent, of humanitarianism. The initial passing of the Poor Law occurred at a time of economic and social disorder, and remained the basis of state policy towards poor children for over 200 years. 340 There was substantial rural unemployment. The reformation had not only destroyed the power of the Monasteries but in doing so had removed a traditional support system for those who were dispossessed. The Elizabethan government was worried about the threat to social order from landless peasants whose labour had not been absorbed elsewhere in the economy. In removing the children of the rural dispossessed a check could be made on the increase in crime and in social disorder. Children were boarded out to reputable citizens to learn new marketable skills.

The social and political turmoil of the 18th century was perceived by the ruling elites to threaten their situation. Relief of the poor was one of the ways in which law and order was maintained. 341 However, by the end of the 18th century the capacity of the Poor Law to cope was being questioned by social and economic change. The countryside had been depopulated, land was being enclosed, there had been poor harvests, and the Napoleonic Wars were having their impact. The consequence was increasing pauperisation. 342 One response to this, both in England 343 and in France, 344 was the Foundling Hospital. These became

340 Dingwall and Eekelaar, above n 217, at 347; Nissim, above n 292.
342 Robert Harris “A Matter of Balance: Power and Resistance in Child Protection Policy” (1990) 12(5), The Journal of Social Welfare Law 332. Harris further notes that urban drift was accelerated through increasing resistance to providing support for “the idle pauper or the bastard progeny of unmarried mothers … [leading to] homelessness, starvation and prostitution.”
343 At 333.
places whereby destitute mothers could leave their unwanted children, but they were not confined to this group.  

A further phenomenon was the influence of philanthropic societies who became involved in the care of abandoned and destitute children. They worked in tandem with the State and were a reaction against the excesses of industrialisation that typified the 19th century. By the end of that century and into the 20th, the moral socialisation of children was a central policy issue. It was often the norm for the provision of material assistance to be accompanied by an assessment of the moral character of the recipient of the assistance. The reality of the Poor Law was the cosh in the velvet glove if the recipient was reluctant to be assisted. The physical welfare of children became an issue of concern as Europe embarked upon its zenith of colonial expansion in the lead up to the conflict in World War I. This was against the background of a declining birth-rate and a population that was unfit for either military or industrial service. There were also the further dual foci of having to be protected from children and the perceived need to protect children who were inherently vulnerable beings.

By the turn of the 20th century welfarism, through government involvement into all aspects of personal and working life, was a reality. In a parallel process the unfettered power of the husband and father as head of the


345 In France, this was achieved by use of the ‘turret’. Donzelot describes the turret as a revolving cylinder with an opening on one side into which the child was placed. The child was placed in the turret, which was then swung on its axis and the child taken into the hospital. This was achieved quite anonymously. In 1811, 269 turrets were in operation in France. At its peak in 1833, 131,000 children were housed in the hospital of Saint Vincent de Paul. They were then gradually done away with, part because a substantial number of legitimate children were being disposed of as their parents were unable to afford to keep them, but also because some parents were then taking their own children back as fostered children as those nursing the children were paid a salary. This was contrary to the original purpose behind the turret which was to relieve families of “those objects of social scandal, their adulterine children”, Donzelot, at 27, but also embraced the “children of the calculating undeserving … and the unwanted offspring of bourgeois families for whom the system constituted a method of family planning”. Harris, above, at 333. Harris records that when the Foundling Hospital in London founded by Thomas Coram placed a basket outside its doors for the “easy and anonymous reception of infants, 117 were placed in that basket on the first day of operation. The use of the turret/basket continues, at least in Russia, where the New Zealand Herald of 2 November 2012 reported that the city of Kirishi had implemented such a system. This allowed a parent to place the unwanted child in a box, its door then closes, alerting a nurse who then recovers the child. That established in Kirishi said to be the 10th such facility in Russia. Irina Titova “Drop off point for Unwanted Babies” The New Zealand Herald (online edition, Auckland, 2 November 2012).

346 Philanthropy in this respect is not simply the doing of altruistic good by which there is private intervention with social concerns. Rather it represents a “deliberately de-politicizing strategy for establishing public services and facilities at a sensitive point midway between private initiative and the State.” Donzelot, above n 344, at 55.

347 Dingwall and Eekelaar, above n 217, at 347–348.

348 Dalley, above n 311; Dingwall and Eekelaar, above ; Hendrick, above n 78; Thomas, above n 78.

349 Hendrick, above.
household was also coming to an end. The State was regulating conditions of work for those in factories and making provision for the compulsory education of children; infant/mortality/health was being addressed; parents who neglected or abused their children could face the prospect of having those children removed and face criminal sanction for their actions.350

The legal framework in England providing for the care of destitute children remained relatively unchanged until the passing of the Children Act 1948. There were further legislative initiatives culminating in the Children Act 1989351 reflecting changing contemporary societal mores. There nonetheless continued to be two essential themes: on the one hand, the perception of a gradual progression and increasing enlightenment occurring352 which paid greater attention to the welfare of children and care being taken in respect of placements,353 hence the notions of the helpless child in need of protection, of the innocence of childhood and the corresponding need therefore for such children to be protected. On the other hand, there remained the perspective that the underlying notion behind protecting children was to restrict spending on the poor and, coupled with this, deal with the perception of the child as a threat to an organised and civil society.354 This perception continues to operate as a potent theme through much of the 20th century, as the State and its social work agencies have moved to develop new strategies “of preventive penology on behalf of young people who were identified as actual or potential threats”355 and to address the twin phenomena of the child as victim and as a threat.356

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350 Dalley, above n 311; Hendrick, above n 78; Thomas, above n 78.
351 And in New Zealand a similar process occurred - with the passing of the Child Welfare Act 1925, the Children and Young Persons Act 1974 and the Act in 1989.
352 Thomas, above. Hendrick, above, at 287 – 288 looks fondly on the 1948 Children Act: he sees it as within the broader concept of the welfare state which emerged from the end of the Second World War and saw families within a democracy. “Nothing of the sort can be said about the 1989 Act [the Children Act in England], which slithered onto the statute book as a tired consensus arrived at between a dispirited and largely defunct Left and a morally arrogant Right, confident of its own ability to continue to successfully articulate social (and, therefore, political) agendas. In essence the Act is about the privatised family. Neither, however, offered much to children as people” at 287. (The comparison with New Zealand is clear, notwithstanding the fact of the Labour Party being the governing party. The Act was passed at a time when the Third Labour Government was at its apogee of having adopted neo-liberal policies.)
353 Thomas.
354 Dalley; Hendrick; Thomas.
355 Parton, above n 77; Thomas.
356 See in this respect the way in which children are perceived in the media when they are murdered or harmed in some way. They are invariably described as being “innocents” or “angels” or something similar. Conversely, when children commit crimes they are described as “evil” or similar. In the United Kingdom the killing of James Bulger by two older children was indicative of both themes. James Bulger was “innocent”: the boys who
The societies/philanthropic institutions established in England, and later in New Zealand, were motivated by the religious beliefs of their respective creators. Children were removed from situations that were seen to be dangerous or unsavoury and action was taken to prevent their abuse and neglect, the poor were moralised about, and children in their care were provided with a Christian education. This reflected a conservative vision of responsible social order. Legislation which addressed both aspects of the conundrum posed by the poor was passed. In New Zealand, the basis of government social service intervention in the late 19th and early 20th century was to place children into residential institutional care. The focus was not on children who had suffered abuse as such but on the abandoned and the destitute: that was only to change in the second half of the 20th century when there was a renewed emphasis on the abused child. The state, therefore, did not have to turn its mind to the need to address or remedy those issues and did not have to consider how to provide care for those children. This reflected particular mores of the time in that the "primary concerns were with the efficient functioning of the family and the maintenance of respectability socialisation."  

5.7 Social and legislative changes in New Zealand

Social and legislative changes in New Zealand reflected what had occurred in England, but with a particular difference given the absence of a national system of poor relief. Social reform in New Zealand reflected a myriad of themes and concerns: there was the desire to create a new society and for that society to be one that was both ordered and orderly. Legislation to address issues of neglect and destitution was passed as the mantle of responsible government was assumed (in part at least) with the enactment of the New Zealand Constitution Act 1852 and the premiership of Henry Sewell in May 1856. As in England, these initiatives reflected the concurrent themes whereby altruism ran in parallel.

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357 Dalley, above n 313.
358 Hendrick, above n 78.
359 Dalley, above, notes by way of example, that the increase in the number of children left destitute following the gold rushes of the 1860s led to calls on central government to make arrangements for the care of those children who were homeless and/or neglected.
360 Hendrick, at 252.
361 Joseph, above n 67.
Legislation reflected those themes. Thus the Neglected and Criminal Children Act 1867 was supported by the Otago Province “in order to rescue a number of children from crime and misery.” A process was instituted whereby the State would intervene in families when children were considered to be at risk of abuse (physical, sexual and emotional/psychological) and neglect. The CYPF Act is the most recent statutory manifestation of this.

The history of New Zealand from the 1850s and onwards was one of increasing colonisation. Belich refers to “a new people, half a million people strong, in less than 50 years, 1840 – 1886”. With such a marked increase in the non-indigenous population, came industrialisation (industry both productive and extractive) and the accompanying social problems that were being experienced in England, the eastern United States and Western Europe. This included an increase in the numbers of children who were orphaned or abandoned or had no one to provide for them. There were a variety of factors that led to this rise in the number of destitute children. One graphic example was the impact of the gold rushes of the 1850s onwards, which affected both the North and South Islands. This phenomenon led to calls to central government to make provision for those children left homeless and destitute. Equally relevant was the development in New Zealand (and their influence, even if they were not yet established) of the religious and philanthropic movements which focused on the prevention of child abuse. This led to the establishment of orphanages and children’s homes by these agencies. The other side of the image of childhood innocence, that of the helpless and indigent child who was potentially dangerous to a well-ordered society remained. Both groups of children, those perceived as the victims

362 Dalley, above n 311; Hendrick, above n 78.
363 W B Sutch The Quest for Security in New Zealand (Oxford University Press, Wellington, 1966) at 51. The rescue of such children from the ills of crime and destitution is clearly stated.
364 Belich, above n 321, at 16.
365 King, above n 17. See also Dalley, above n 311; Hendrick, above n 78.
366 Such as the National Society for the Prevention of Cruelty to Children (founded in England in 1889) and corresponding American societies that were founded at around the same time.
367 Dalley; Hendrick,.
368 However, see Belich at 356-357 where the discussion concerns the New Zealand ‘wild child’ (within its context the Pākehā colonial child) who was the more typical child than the child who is owned by his parents (the ‘chattel child –“repressed, overworked and often short-lived, and comprehensively subject to adult control”, at 357), who certainly existed in New Zealand but was not dominant. Children had to be repressed to prevent them from becoming ‘little savages’.
of abuse and as having been the victims of economic exploitation, together with criminal children, became the dual focus of the 19th century legislature.369

In New Zealand, the burgeoning ‘post-colonial’ experience in the period of the Liberal Government in the last decade of the 19th century reflected a similar phenomenon. During this period, largely due to the influence of William Pember Reeves, the responsible minister at the Labour Department and his head of department, Edward Tregear, there was considerable improvement in working conditions for women and children.370 The development of social services in New Zealand during the period of the Liberal Government saw New Zealand become known as a ‘social laboratory’.371 King cites from Reeves’ explanation in The Long White Cloud about “the raison d’etre for the Liberal reforms:372

They were the outcome of a belief that a young democratic country, still almost free from extremes of wealth and poverty, from class hatreds and fears and the barriers these create, supplies an unequalled field for safe and rational experiment in the hope of preventing and shutting out some of the worst social evils and miseries which afflict great nations alike in the old world and the new.

5.8 Early New Zealand legislation

In 19th century New Zealand the English model of poor relief – the workhouse – was incapable of being implemented on a national basis given the cost imposition on local communities, with the funding responsibility falling on the province in question.373 Nonetheless, the themes that underpinned the Poor Law and the workhouses remained. There were the conflicting dynamics of firstly, humanitarianism and, secondly, fear of the poor and of the indigent child, but with the response being constrained by the realities of a young colony. How was the response to these issues to be funded? Initially poor relief was instituted in the provinces. The costs involved for the Wellington, Canterbury and Auckland

369 Dalley, above n 311; Hendrick, above n 78.
370 King, above n 17. This reflected the interest that Tregear had with both. See Belich, above n 321, at chapter five “Moral Harmony: A new Crusade”, for a more expansive discussion of the moral evangelical movement and its impact on New Zealand society from the 1880s through to 1930.
371 Dalley.
372 William Pember Reeves The Long White Cloud (Horace Marshall & Son, London, 1898) at 30, cited by King, above n 17. This said King, “was from the point of view of one who had participated in their planning and execution.”
373 Sutch, above n 364, at 112.
provinces were inadequate to relieve poverty.\textsuperscript{374} In 1868 the Auckland Provincial Council
passed the Sick and Destitute Act. This levied a tax on all non-Māori male adults to fund the
maintenance of destitute and sick persons and of neglected and orphan children. This was
notwithstanding the view held that a children’s poorhouse was needed given the social
problems that were present. Other alternatives had to be found, with private charity being the
appropriate way to address relief of the poor.\textsuperscript{375}

The first national statute was the Masters and Apprentices Act 1865. The preamble stated
that it was “An Ordinance for the Support of Destitute Families and Illegitimate Children.”\textsuperscript{376}
This was an enabling and not a protective measure. It empowered justices to bind boys and
girls over 12 years of age (including orphans) as apprentices to “householders, tradesmen,
farmers and any other person exercising any trade art of manual occupation.”\textsuperscript{377} The
apprenticeship was “for the maintenance of children deserted or left without adequate means
of support.”\textsuperscript{378} Should an apprentice be ill-used or neglected by his master, then two Justices
could cancel the indenture and discharge the apprentice of his obligations; any master who
was found to have acted in such a way was liable to a fine not exceeding ten pounds. On the
other hand, a male apprentice over the age of 14 who was in breach of his duty, was
disobedient or ill-behaved could be punished by being placed in solitary confinement in a
gaol for any time not exceeding three days. The term of indenture was for five years and
would expire when the child reached the age of 19 years. If the apprentice was a female,
discharge could earlier occur when consent was given for her to be married.\textsuperscript{379} The master
was required to provide “sufficient and suitable food, clothing and bedding”,\textsuperscript{380} to pay the
male apprentice up to two pounds per year and the female apprentice 30 shillings during the
last three years of the apprenticeship.\textsuperscript{381} The apprentice was, where practicable, to attend

\textsuperscript{374} Sutch, above, n 364, at 48-51.
\textsuperscript{375} Sutch, at 51.
\textsuperscript{376} This reflected what was occurring in England – for as s 4 of the Act provided, masters of apprentices had the
same powers over their apprentices as in the United Kingdom. Masters and Apprentices Act 1965.
\textsuperscript{377} Section 9. There were exceptions: for example, those articled as clerks of attorneys and solicitors.
\textsuperscript{378} Section 11.
\textsuperscript{379} Sutch, at 112.
\textsuperscript{380} Section 8.
\textsuperscript{381} A pound was made up of twenty shillings: a male apprentice was therefore paid ten shillings more than his
female counterpart.
divine service at least once every Sunday “and shall have particular attention paid to his morals.”

The Neglected and Criminal Children Act 1867 followed. New Zealand was feeling the need for a poor house. The Long Title stated that it was to provide for the care and custody of neglected and criminal children, with the preamble referring to it as being “expedient to provide for the care and custody of neglected and convicted children and to prevent the commission of crime by young people.” This reflected the dichotomy between children being vulnerable and at risk yet, at the same time posing and presenting as risks. The Act established reformatory and industrial schools. Section 12 of the Act provided that every boy or girl under the age of 15 years was deemed to be a ‘child’ within the meaning and for the purpose of the Act, and every person detained in a school was deemed to be an ‘inmate’ within the meaning of the Act. Of significance was the definition of a neglected child as found in s 13:

Any child found begging or receiving alms or being in any street for the purpose of begging or receiving alms:

Any child found wandering about or frequenting any street thoroughfare, tavern or place of public resort or sleeping in the open air and who shall have no home or settled place of abode or any visible means of support:

Any child who resides in a brothel or associates with any person known or reputed to be a thief prostitute or habitual drunkard or with any person convicted of vagrancy:

Any child who having committed any offence punishable by imprisonment or some less punishment ought nevertheless in the opinion of two justices regard had to his age and the circumstances of the case to be sent to an industrial school:

382 Section 8.
383 Sutch, above n 364, at 51.
384 Sutch notes that prior to the Act, the Auckland Province sent vagrant children to the stockade where they mixed with criminals.
386 Neglected Children Act 1867. Section 2 of the Act conferred primary jurisdiction on two Justices of the Peace acting together or on any Resident Magistrate.
Any child whose parent represents that he is unable to control such child and that he wishes him to be sent to an industrial school and gives security … for payment of the maintenance of child in such school.

Further, s 14 empowered any constable, who thought the circumstances of a particular child made the child neglected, to take the child without warrant before two or more justices. Section 15 authorised the Court, on being satisfied it was dealing with a neglected child, to direct the child to an industrial school and to be detained for not less than one year and not more than seven years. In respect of convicted children, s 16 provided whether convicted on indictment or summarily, the Court could, in addition to any other punishment imposed, direct that the child be sent to any of the reformatory schools in the province and be detained at that school for not less than one year and not more than seven. Any such direction, if given, was not part of the sentence imposed in respect of the conviction, but was a “distinct and collateral proceeding.” A convicted child could not be sent to an industrial school, and a neglected child could not be sent to a reformatory school.

Reflecting the Victorian ethos, the Act provided that when a child was sent to either an industrial or a reformatory school, regard was to be had to the religion to which the child belonged and a direction accordingly given that the child be brought up in that religion. These schools had a strong punitive aspect and often saw children placed within them losing contact with family and with friends. Mirroring a different aspect of the same tenet, children who were placed in either an industrial or reformatory school could be placed out for service by the superintendent of the province. A license for up to three years could be granted to a person who was willing to receive and to take charge of an inmate. This usually involved farm labouring for boys and domestic work for girls.

Industrial Schools were further formalised by the Industrial Schools Acts of 1882 and 1908. These were used for the control and supervision of neglected and criminal children. The

387 In the province where the Court was sitting.
388 The difference lay in the term of the sentence that could be imposed.
389 Section 16.
390 Section 18.
391 Section 17. This was in the opinion of the Court.
392 Dalley, above n 311.
393 Dalley, above n 311.
394 At 17. Indigent and neglected children were to be kept separate from criminal children. In practice no distinction was made.
police were empowered to uplift neglected children without warrant and to bring them before the justices. The Report on Pauperism referred to “‘schools for orphan and destitute children are becoming very costly and the number of children needing the care and protection of Government … increasing rapidly.’” 395 The Industrial Schools Acts provided for children to be boarded out with foster parents in a family environment. This was an exchange, whereby caregivers received maintenance payments from the government for the labour of those children. 396

By 1916 the essential aspects of the child welfare system and its underlying precepts was in place. The state, in the embodiment of the Department of Education, was now interested in all aspects of the life of the child: it covered not only welfare but also health and education; it had children’s homes for some of those who were being cared for by the State and took responsibility for boarding out others. The state was also concerned with the well-being of children in private homes and with juvenile offending. There was by now a partnership between the State and the community in “nurturing the country’s welfare.” 397

A further change took place between 1916 and 1925 with the passing of the Child Welfare Act and the establishment of the Child Welfare Branch of the Department of Education. Many of the legislative changes consolidated and codified existing practices. The 1925 Act saw the government catching up with policy that had already been implemented in the years preceding the Act. 398 The years following the 1925 Act saw profound changes wrought by the depredations of the great depression and the subsequent election of the first Labour Government in 1935. The passing of significant social legislation and the establishment of the welfare state 399 that occurred reflects the theme of ‘welfarism’. The changes then

396 Dalley, above n 313.
397 Dalley, at 63. Albeit that the partnership was inherently unequal. Industrial Schools were transferred to the Department of Education and this continued to be the case until 1972. They were no longer called by that name however. This saw a change in focus from a concern with primarily penal matters to a more reformative notion.
398 At 90. Foster placements (or “boarding out” as the English phrase had it) for children was preferred as opposed to placement in a residential institution. This was a less expensive form of care: numbers had drastically risen in the two-years preceding 1916; it was philosophically better as a foster home provided personal care where appropriate moral and guidance could be given to these otherwise destitute and neglected children. Fostering also “reinforced the ideologies of racial fitness and national efficiency” at 18. It reflected as well the perspective that the family should be at the centre of life for children. The world war was also a catalyst for change: there was a focus on maternal and infant wellbeing. For example, school medical and dental services were expanded and children’s health camps were set up in 1919, at 67.
399 Of which the Social Security Act of 1938 was the most profound. It saw the implementation of a virtually free health system, means-tested old-age pension at 60 years and universal superannuation at 65 years. There
wrought continue today, notwithstanding the retreat from the high-water mark of the cradle to grave welfare state by the third Labour Government following its election in 1984 and the continuation of those policies by successive governments.

5.9 Conclusion

This chapter has illustrated how, within the overall paradigm of welfarism, the State has become increasingly involved in the regulation of families and the protection of children. In terms of the three themes, the development of the wardship and parens patriae jurisdictions saw the State, in the form initially of the Sovereign and within the mantle of the prerogative powers inherent in an absolute monarchy, recognising there was a duty owed to protect the property of child heirs and then to the protection of children’s well-being generally. The jurisdiction remains and its primary purpose is to protect children, with this occurring on behalf of the State acting within the parens patriae jurisdiction.

The second aspect, the attention given to destitute families and children by the Poor Law, saw the development of the coercive state and a conservative reaction to societal change. That is not to say there was no humanitarian aspect also present, as medieval and renaissance writings indicate this was a factor. In many respects, a child of the Poor Law represents as much the failures and hopes of the society it was a member of, as does the child of the 20th or 21st centuries who is in the care of the Chief Executive. Poor Law children occupied a “transitional position between the State as the arbiter of rescue, reclamation and protection, and as the provider of services for children as publically recognised citizens of the future.” That statement applies with equal resonance to the child of the early 20th century. Equally, the response of the State to Poor Law children, which involved the attempted reconciliation of what were “often conflicting demands of administrative efficiency, law cost, educational value and moral tuition, while simultaneously avoiding exploitation or inhuman treatment” reflects the same situation that the State must address today.

were significant advances in housing. There was also a spectacular improvement in every respect for Maori in terms of social security, education and housing. King, above n 17.

400 CJ Sommerville The Rise and Fall of Childhood (Beverly Hills, Sage Press 1982), cited by Dingwall and Eekelaar, above n 196, at 346.
401 Hendrick, above n 78, at 74.
402 Hendrick, at 74.
403 An interesting perspective is offered by Hay, above n 341, at 34-35. In discussing the rhetoric of the law he noted that “even at the level of the justice [of the peace] the rules of law could be used effectively on behalf of a
The third factor, the reaction of governments to the philanthropic societies and the challenges arising from the social and industrial challenges of the 19th century (and into the 20th century) saw the creation of the contemporary state with its panoply of social legislation (in the areas of health, education, housing and social policy) that still exists, notwithstanding the reaction against the intervening state brought about by the neo-liberal changes of successive governments since 1984.

Against this historical backdrop, the statutory framework that applies in respect of children who are removed from the care of their parents by the State is examined in Chapter Six.

labouring man.” It was not unknown for labourers caught deer stealing who would make use of conflict within the statutes of the time and thereby escape punishment. “The occasional successful use of such ruses … probably helped sustain the belief that the integrity of the law was a reality and not merely the rhetoric of judges and gentlemen.” Hay then observed that justices sometimes intervened in the administration of the poor laws by prosecuting “callous overseers who forced paupers to marry to remove them from the rates, or who dumped them over parish boundaries to die at the expense of their neighbours.”
CHAPTER SIX

The Statutory Framework for the Permanent Care of Children under the CYPF Act

6.1 Introduction
This chapter describes the legal framework utilised in respect of children who have been removed from their families by the Chief Executive and where there is an intention not to return the child.\textsuperscript{404} It sets out how, as a matter of law when a custody order is made, the Chief Executive assumes specific responsibilities for these children.

The chapter commences with a brief historical summary of New Zealand legislation that has addressed the status in law that the State has assumed in respect of children who have been removed from their parents. This first occurred with the Industrial Schools Act 1882, when the State saw fit to assume custodial control of certain categories of children. The Act is the latest incarnation of that process. The expressions ‘custody’ and ‘guardianship’ are examined, with a particular focus on the former: what does the law say happens when such an order is made in favour of the Chief Executive and what are the consequences of that?\textsuperscript{405} The statutory framework is then considered: there are two aspects to this; firstly, how the effect of a custody order places on the Chief Executive precisely the same obligations as any parent has in respect of their own child. Secondly, I deconstruct the specific provisions and explore how the Act deliberately embraces the notions of ‘care’, ‘possession’ and ‘control’ within the definition of ‘custody’. In this respect it is quite distinct from COCA, which forsakes those. The Chief Executive assumes as part of his role, the duty and responsibility to care, possess and control the child. The chapter concludes with a discussion of the issues involved in this and notes the very clear nexus between the concept of role responsibility and the effect of an order placing a child in the custody of the Chief Executive.\textsuperscript{406}

\textsuperscript{404} It should be noted that this legal framework – the making of a custody order under s 101 and, in some but not all instances, the appointment of the Chief Executive as an additional guardian, may, and often does, occur in situations where the social work strategy is to effect the return of the child. The same duties and responsibilities nonetheless apply.

\textsuperscript{405} It should be noted that people other than the Chief Executive may be granted custody of a child and may also be appointed as a guardian (whether sole guardian or as an additional guardian).

\textsuperscript{406} As previously canvassed in Chapter Four.


6.2 Historical antecedents

The effect of a custody order in removing from the parents of the child the legal responsibilities for caring for that child is not a new phenomenon. This has occurred from the time of the very earliest legislation of this type. Section 27 of the Industrial Schools Act 1882 conferred on the manager of each school the powers of day-to-day care and of guardianship of children,

…the powers and authorities over the person over whom such guardianship is exercised which a guardian of the person of an infant appointed by the Supreme Court would have.

The section went on to suspend the guardianship of the parents for the duration of time that the child was under the authority of the Industrial Schools Act:

The parent of any child being the person over whom such guardianship is exercised shall wholly cease to have any legal control or guardianship over such person over whom such guardianship is exercised so long as he continues to be the person over whom such guardianship is exercised.

The Children’s Protection Act 1890, an Act for the prevention of cruelty to and better protection of children, is another early example. Section 7(1) provided that when a child, being a boy under the age of 14 years or a girl under the age of 16 years, was brought before a Magistrate following either the conviction of a person for specified offences relating to a child in his custody or was committed to trial for such an offence, or bound over to keep the peace towards the child, then the child could be taken out of the custody of that person and “committed to the charge of a relation of the child or some other fit person.” Where this occurred, s 7(2) (in part) conferred upon the person who then had care of the child:

…the like control over the child as if he were its parent, and shall be responsible for its maintenance, and the child shall continue under the control of such person, notwithstanding that it is claimed by its parent …

407 Or an order for sole guardianship as the case may be
408 Noting that both were then incorporated within the concept of guardianship.
409 The then equivalent of the High Court of New Zealand.
410 The Long Title of the Act.
411 For wilfully ill-treating, neglecting, or abandoning the child in a manner likely to cause the child unnecessary suffering or injury to its health.
Similarly, s 26 of the Industrial Schools Act 1908 provided that an order for guardianship made in respect of an inmate of a school, meant that guardianship would vest in the manager of the school, and that the order could last until the inmate turned 21 years or was sooner discharged.\textsuperscript{412} Section 27 then provided that the manager, as guardian, would have all of the powers and authorities over the inmate as could be exercised by any guardian appointed by the Supreme Court and that the parent wholly ceased to have any legal control or guardianship over the child.\textsuperscript{413}

The Child Welfare Act 1925 was of like effect. This made provision for children to be committed by a Children’s Court into the care of the Superintendent of the Child Welfare Division of the Department of Education.\textsuperscript{414} Where this occurred, the Superintendent by virtue of s 16(1):\textsuperscript{415}

\begin{quote}
…shall have and may exercise to the exclusion of all other persons, same powers and rights in respect of the child as if he were guardian of the child appointed by the Supreme Court under had been appointed under the … Infants Act 1908.
\end{quote}

The Children and Young Persons Act 1974 continued that general statutory approach. By virtue of s 12, parents could apply to the Superintendent of the Child Welfare Division of the Department of Education who would then “assume control of, [that] child for such period and on such terms as to the cost for maintenance and otherwise as may be agreed on by the parties.” Further, s 12(2) made it clear that when any agreement was entered into, the Superintendent shall for “so long as the child is under his control, have the same powers and responsibilities in all respects as if the child had been committed to his care in accordance with … [under the Act by a court].”\textsuperscript{416} The effect of this provision is precisely the same as s 104(1) of the Act.

\textsuperscript{412} Section 26 (3).
\textsuperscript{413} Section 27(1) and (2).
\textsuperscript{414} The Child Welfare Act 1925 for the first time set up a specific branch of government to address issues of child welfare.
\textsuperscript{415} The Infants Act 1908 was the then private law equivalent of COCA.
\textsuperscript{416} The 1974 Act made provision for agreements to be entered into between parents and the Director-General. These agreements could be significant duration. See Neil Johnstone and Rod Hooker “The Law Relating to Foster Care in New Zealand” [1985] NZLJ 160.
6.3 The CYPF 1989

The Chief Executive takes on quite specific duties in law when he assumes custodial status of a child under s 101 of the Act, and these duties are supplemented when appointed as an additional guardian of the child under s 110(2)(b). These duties must be exercised by the Chief Executive when exercising custodial powers. What is clear is that the Act confers on the Chief Executive a clear and unequivocal custodial right to possess the child. This reflects the statutory context within which the Chief Executive operates: the Act is a broad canvas encompassing both care and protection and youth justice matters. A child or young person may have a status under either or both. For example, a 13 year old who was initially the subject of an application for a declaration under s 14(1)(e), may still be in the custody of the Chief Executive under s 101 as a 14 year old and then, as a consequence of committing offences also be in the Youth Court and in the custody of the Chief Executive under s 238(1)(d) of the Act.

The definitions found in s 2 of the Act cover both the care and protection and youth justice jurisdictions and must, therefore, subject both to the context in which they are found and to an appropriately purposive interpretation that applies across the board. Thus, ‘custody’ is defined in s 2 as being quite unequivocally both ‘possession’ and ‘care’. ‘Possession’ is necessary because of the need for literal custodial (lockup if necessary) control. The definition equally invokes the clear duty to provide ‘care’. In addressing this, regard must be had to the specific statutory wording: thus s 101 of the Act provides for children to be placed in the custody of the Chief Executive. The consequence of that order is prescribed by s 104(1)(a): it is as if a parenting order providing for day-to-day care of a child has been made under s 48 of COCA. Section 48 refers to providing day-to-day care for a child by the person with the benefit of the order: this in turn leads to the separate definition of what is meant by the ‘role of day-to-day care’ which will include, while exercising that role, exclusive responsibility for the child's day-to-day living arrangements. Section 48 is nothing more than the codification of the rights, duties and obligations that attach to the role

417 It will be recalled that when appointed as sole guardian, the Chief Executive assumes all powers in respect of the child to the exclusion of its parents. There is no need for an order for custody when an order for sole guardianship has been made.
418 This is the statutory ground intervention embracing children who have committed offences.
419 Under the youth justice provisions of the Act.
420 This word is not defined in the Act and can therefore be given its normal dictionary meaning.
421 See s 8 of COCA and the definition of ‘role of providing day-to-day care.’ The definitions are not helpful.
of birth parents when exercising day-to-day care of their own children. This requires exploration of what is involved in a parenting order – as whatever constitutes the responsibilities of a parent in this respect will provide an answer to the responsibilities conferred on the beneficiary of a s101 order. This must, as a matter of law (and logic) embrace the Chief Executive.

6.4 How does custodial status come about?

This part details the steps that are taken in order to obtain orders for a child considered to be in need of care and protection under the Act can be considered in relation to Shanaia and Zeppelin’s case studies. In respect of Zeppelin, this includes the interface between the care and protection and youth justice parts of the Act.

There are a number of ways in which children may find themselves in the custody of the Chief Executive. They may be the subject of agreements reached between parents (or caregivers for the time being of those children) and the Chief Executive; or children may be in the care of the Chief Executive under an order under the Act. Other children may have been placed under the guardianship of the Family Court, with the Chief Executive being agent of the Family Court and has been directed to place that child. Yet another group, primarily young people, will be in the custody of the Chief Executive through their

422 Or, if not the parents, then the caregivers for the time being of the children. This occurs under ss 139, 140, 141, and 142 of the Act. Such agreements involve a contract between the parents/guardians/caregivers of a child and the Chief Executive. They are time limited. Thus an agreement under s 139 (a temporary care agreement) subsists for 28 days only and may be renewed once only; extended care agreements under s 140 may last for up to six months for children under the age of seven years and up to twelve months for those over that age. Agreements for the care of severely disabled children (s 141) may last for up to two years and be extended for further periods of two years if sanctioned by a family group conference.

423 Under ss 78, 101, 102 or s 110(2)(a). The first three are orders for custody; the latter is an order for sole guardianship. Sole guardianship embraces custody (or day-to-day care). It excludes those young people (over the age of 14 years who are in the custody of the Chief Executive as a consequence of their criminal offending.

424 These children may also referred to as being wards of the court or wards of the State. These children may end up in permanent alternative care or may go home. If the former, there is often and usually a transition back to the Act, being the more appropriate legislative framework to effect that. See for example, B v Family Court, above n 241; WAH v WTW, above n 243; Tipene v Henry; above n 243.
involvement with the Youth Court. It can be seen, therefore, that although ‘custodial’ status has a statutory basis, not all children with that status will be the subjects of orders from the Family Court.

6.4.1 Shanaia and Zeppelin

For both Shanaia and Zeppelin the Chief Executive has, via a social worker exercising delegated powers, filed an application for declaration under s 67 of the Act that each was in need of care and protection. The applications were made under s 14(1)(a) and (b) for Shanaia and under s 14(1)(d) for Zeppelin. Affidavits accompanied each application setting out the necessary evidential basis. Those declarations were made and this provided the jurisdiction for the subsequent involvement of the Family Court and the Chief Executive.

6.4.2 Shanaia

At the time of the application for declaration being filed, the Chief Executive also sought, and obtained, an order placing Shanaia in custody pending final determination of the proceedings. This was under s 78 of the Act. This reflected the immediate seriousness of the care and protection concerns expressed and identified by the applicant social worker.

Jolene opposed the removal of Shanaia and sought her return. At the conclusion of the defended hearing, the judge reserved her decision. Shanaia remained in the custody of the Chief Executive. The decision was subsequently released, with the case advanced by the Chief Executive succeeding. The judge called for a report from the Chief Executive under s 128 of the Act. The Chief Executive had 28 days in which to prepare and file this. The plan was required because of the intention (recognised by the Court) of the Chief Executive

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425 I am not concerned specifically with this group. However, in in some instances children (as defined in s 2) may be the subject of youth justice custodial orders if they have been charged with particularly serious offences such as murder or manslaughter. However, as noted some young people will have a status under both the care and protection and youth justice provisions of the Act. Where this occurs, the youth justice provisions take priority.

426 A declaration once made, represents an acknowledgment by the Family Court that the child or young person is in need of care and protection as defined one or more of the grounds set out in s 14. Section 78 is reproduced in Appendix 1.

427 Under s 14(1)(a) and (b) Shinaia was found to be a child who had been physically, emotionally and psychologically abused or deprived; her development and wellbeing was said to be or was likely to be impaired or neglected, and that impairment or neglect was, or was likely to both serious and avoidable. The physical abuse suffered was established by the medical evidence; psychological the emotional and psychological abuse was a consequence of that physical abuse and of the parenting that she had received.

428 In respect of Zeppelin, the case was advanced that he was, by virtue of his situation, behaving in a way that is or is likely to be harmful to his physical, mental or emotional wellbeing (or to others) and that his parents were unable or unwilling to control him.

429 See s 131.
to seek a custody order and/or an order for guardianship. The plan, when filed, advised of the intention to permanently place Shanaia away from her family and recommended that the Court make orders placing Shanaia in the custody of the Chief Executive and appointing the Chief Executive as an additional guardian.

6.4.3 Zeppelin

The situation here was quite different to Shanaia's. A declaration had already been made following a family group conference where it was agreed that Zeppelin was in need in care and protection and that the appropriate way to address this was by a support order. Its purpose was to sustain Zeppelin in the care of his parents with social work support. After the death of his father and the decision of Ms Led to shift to Australia, an application was made by the Chief Executive for discharge of the support order and substitution of it with orders for custody and for additional guardianship. Those orders were made.

Zeppelin was then 12 years of age. He operated at an intellectual /cognitive level well below his chronological age; this was compounded by his Attention Deficit Hyperactivity Disorder, and his sexual gender identification. Skilled caregivers were required to parent him. The Chief Executive contracted the Child and Family Focus Trust to find a placement. The Trust owned a number of properties. These included individual houses pepper-potted throughout various communities (urban and rural) where one-on-one care was provided, and ‘family homes’ which catered for up to three to five children at one time. Zeppelin was initially placed in one of the ‘family homes’ but this was not successful. Zeppelin’s gender conflict led to him being assaulted and at times problems arose from him being both a sexual victim and predator. Absconding became an issue.

430 See s 128(2).  
431 The making of the s 101 custody order provided the Chief Executive with a power to place Shinaia apart from her family. The appointment as an additional guardian enabled the Chief Executive to make decisions constituting guardianship – in conjunction with the other guardians in law of Shinaia.  
432 See note 103 above.  
433 Why an order appointing the Chief Executive as sole guardian in that circumstance was not made can only be speculated at.  
434 The Trust was a Child and Family Support Service approved under s 369 of the Act. The Child and Family Focus Trust was established for the purpose of providing residential care and behavioural change therapy to children and young people. To be eligible for admission into the programme, the child had to be the subject of a s 101 custody order in favour of the Chief Executive. A psychological assessment had also to be undertaken of the child.
After five months he was moved to a one-on-one placement with the Trust. Attempts were then made to transition Zeppelin to a mainstream school that had a special needs unit. This was Pukapuka Area School, in a low decile area of Auckland. The caregivers lived 11 kilometres away. (The nearest school to where they lived was not able to cater for Zeppelin and his identified needs.) It was hoped Zeppelin would be able to walk the 25 minutes to the local railway station to catch the train to school which was one kilometre away from the railway station. Zeppelin was shown how to get to and from school from the caregiver’s home. He was unable to do this on his own, lacking confidence to catch the train and getting lost when walking to school and home again. Zeppelin was also thought to be engaging in prostitution on the way home. After a period of time (seven weeks) when he did not attend school at all, the Chief Executive arranged for Zeppelin to be picked up by taxi each morning and taken to school. In the afternoon, he was picked up from outside the college and taken home. The Chief Executive, however, only committed himself to the cost for the balance of that school year and the opening two terms of the next school year.

Zeppelin attended a holiday programme for the latter half of the long Christmas/New Year holidays. A full-time tracker was provided by the Chief Executive. In the last week of the programme Zeppelin and another young person absconded, stealing a car. Zeppelin, although the older of the two, was not the active participant, only going along for the ride and the promise of alcohol and drugs. The boys were picked up by the Police the following day. The car was smashed up. Zeppelin was arrested. He was charged with unlawfully getting into a motor vehicle and appeared in the Youth Court where he was placed in the care of the Chief Executive under s 238(1)(c) of the Act. Zeppelin was placed with the Torch Trust. This organisation takes referrals on an urgent basis, for a maximum of seven days. A referral was made for a Youth Justice Family Group Conference. It was accepted, reluctantly by Zeppelin’s care and protection social worker, that Zeppelin’s offending was clearly linked to his care and protection issues and that it was inappropriate to discharge the s101 order and

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435 An Area School caters for children from year 1 (first entrants) to those in year 13 (adolescents in their last year at secondary school before going on to tertiary education or into the workforce.)
436 A tracker is a person employed to accompany a child to ensure that he does not abscond or behave in a way that places the child or any other person at risk.
437 This is a power to place – with an approved person. It is not a custodial power as such. In this respect it is in contrast to s 238(1)(d) which empowers the Youth Court to place a young person in the custody of the Chief Executive. This is a specific power to detain.
438 Zeppelin now had both a care and protection social worker and a youth justice social worker.
leave Zeppelin in the Youth Court. A recommendation was made that the Youth Court referred his case to the Family Court under s 280 of the Act. This occurred.

Following the expiry of those seven days, Zeppelin’s social worker (of which there had been five since the Chief Executive had assumed custodial status) placed Zeppelin with Mr and Mrs Uriah Heep. They were dairy farmers and unable to provide 24/7 care. This was intended as a stop-gap placement while a search went on for a permanent placement. The placement lasted for nine weeks, with a four day intermission after the first ten days when Zeppelin was sent back to the Torch Trust. Zeppelin had thrown a tantrum and smashed up his bedroom. During the balance of those nine weeks Zeppelin’s placement was only just sustained. The caregivers had no physical contact with the social worker, having to rely on telephone support only. The placement came to a premature end: Zeppelin lost his temper when being told to pick up his dirty underwear and verbally (grossly) abused Mrs Heep. Her response was to slap him across the face and call his social worker.

Zeppelin spent another period with the Torch Trust, this time for five days. Zeppelin was then found further short term places to live. These were with caregivers contracted to the Chief Executive and to a NGO. Zeppelin’s social worker, under some pressure from Zeppelin’s lawyer, made a referral for Zeppelin to be admitted into the Chief Executive’s Auckland care and protection residence, Whakatakapokai. This never eventuated. Zeppelin was so far down the list of those waiting admission that in order to be bumped up he would have had to have engaged in particularly profoundly disturbing behaviour.

Zeppelin was next placed with Mr Jethro Tull and his partner Ms Blodwyn Pigg at their semi-rural home outside of Takitimu. Mr Tull and Ms Pigg were caregivers for Livingstones, a NGO providing contracted care for CYFS. As part of the contract, double board payments were paid to Mr Tull and Ms Pigg. Against the opposition of the Chief Executive, Zeppelin’s lawyer got the Family Court to make it a condition of the s 101 order that Zeppelin be physically seen by a social worker no less than once a week. Zeppelin’s social work is provided from a site in South Auckland. That office has contracted with the Takitimu site to provide a co-worker. This took three months to arrange, notwithstanding the clearly articulated policy on transfers and the condition attaching to the s101 custody order.439

439 Some incentive occurred in this respect when Zeppelin’s lawyer asked the Family Court to issue summonses to the respective site managers so that an explanation as to how the Chief Executive’s transfer policy was able to
Zeppelin has been sustained in the placement with Mr Tull and Ms Pigg. Consideration is now being given to what occurs when Zeppelin turns 17 years of age and the expiry of the s 101 custody order.

6.5 Definitions and orders

It is now timely to look more closely at the substantive statutory context – of both the CYPF Act and COCA. It is to be recalled that these statutes share concepts relating to the care of children that are in essence (seemingly) identical, albeit referred to by different terminology.\(^{440}\) The language used is significant as different meanings are to be attributed to the specific words when used in their respective statutory contexts. This is despite both the apparent intent in the legislation that there be no difference and the reality of what happens on a daily basis in Family Courts throughout New Zealand.\(^{441}\)

‘Custody’: Custody is defined in s 2 as a ‘right to possession and care of a child or young person.’ This definition reflects precisely the definition of custody found in s 3 of the Guardianship Act 1968. It has been assumed by those in legal practice that the retention of the term custody in the CYPF Act was but an oversight, with no particular weight or emphasis needing to be given to the differences in meaning.\(^{442}\) This was notwithstanding that there were some consequential amendments to the Act when COCA was enacted: for example, s 104(1)(a) and (c) were amended to respectively refer, firstly, to s 48 of COCA and, secondly to provide that a s 101 order be an order that is embraced by the Convention on the Civil Aspects of International Child Abduction (‘Hague Convention’). The practitioner’s assumption was reinforced given that the concept of ‘guardianship’ found in both statutes is operate in way that was inimical to the welfare and best interests of children and young people. This is not a far-fetched scenario. Having managers summoned to explain deficiencies in practice occurs on a regular basis. This writer in 2010 was appointed as lawyer to assist the Court in one case to investigate and advise on the application of the transfer policy in a case where the social work was carried out in Whanganui but where the children were in South Auckland. A similar situation occurred in 2013 in another case where I am lawyer for the children. The responsible site office was in South Auckland; the children were placed in North Auckland. There was a failure to co-ordinate social work between the sites and consequently necessary social work support was not provided to the children and their caregivers. This is an example of an internal silo mentality in operation.\(^{440}\) Thus the Act refers to ‘custody’ and ‘access; COCA refers to ‘parenting orders’, ‘day-to-day care’ and ‘contact.’ A ‘parenting order for day-to-day care’ is the equivalent to ‘custody’ and ‘contact’ is the equivalent to ‘access.’\(^{441}\) The expressions ‘custody’ and ‘access’ were not repeated in COCA because of the possessory meaning attributable to the former and because of the corresponding lesser status conferred on a non-custodial parent by the latter – in situations whereby following the separation of parents such distinctions were not warranted.\(^{442}\) A personal view, and understood (anecdotally) to be commonly held – when thought about. On further analysis, the anecdotal understanding turns out not to be the case.

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\(^{442}\) A personal view, and understood (anecdotally) to be commonly held – when thought about. On further analysis, the anecdotal understanding turns out not to be the case.
used in precisely the same way in each – in terms of what is intended by the meaning to be
given to it and to the exercise of the incidents that attach. The differences that exist lie in
more peripheral matters.443

Interim custody orders: In child protection cases it is often necessary to remove a child from
her environment before the Family Court is formally satisfied that the allegations of abuse
are, in fact, formally established. The Court will make a custody order under s 78, satisfied
that a ground set out in s 14(1)444 – is made out and that the child is, prima facie, in need of
care and protection pending determination of the substantive application.445 The order is also
used when a declaration has been made by the Court and the case adjourned for a plan.446

Final custody orders: The s 101 order is made once the Court is satisfied that the child is in
need of care and protection on the grounds alleged. It is also sometimes referred to as a ‘final
order’, in contradistinction to orders made under s 102.

Section 102: A s 101 also embraces a s 102 order. The latter provides that instead of making
a ‘final’ order under s101, the Court may make an interim order under s 101. An order so
made can subsist for six months.447 Strictly speaking, the order is one made under s 101 with
s 102 spelling out the conditions that apply.

There is a statutory nexus between ss 78 and 101 provided by s 80. The effect is to provide
that s 104 applies to a s 78 order as if that order was one made under s 101.448 Thus, when an
order is made under s 78, the Chief Executive, as a matter of law, has precisely the same
powers and responsibilities in respect of and over the child who is the subject of the order as

443 Which reflects the difference between the two statutes: COCA is private law and, for example, provides a
variety of ways for appointment of a guardian to occur reflecting the changes in family structure that can occur
when families are re-arranged as a result of separation and re-partnering or the death of a parent (guardian).
444 Other than s 14(1)(e), the ground relating to offending by a child aged between 10 and under 14 years of age.
Separate criteria apply to s 14(1)(e) proceedings.
445 “In any proceedings under Part II of the Act, … The Court may, on the application of any party to the
proceedings, or a … representing the child …, or of its own motion, make an order relating to custody of the
child … pending determination of the proceedings.”
446 And with it being anticipated that the Court will be asked to make certain of the orders set out in s 83 of the
Act.
447 At the expiry of the 6 months, the Court may make one further such order or make a final s 101 order, or
make such other orders as specified in ss 83(1) and 84(1) of the CYPF Act or discharge the order.
448Section 80 reads: “Section 104, section 105 (other than paragraph (a), paragraph (b)(i), and paragraph (c) of
subs (1) of that section), section 106, and section 107 of this Act, so far as applicable and with all necessary
modifications, shall apply with respect to every order made under section 78 of this Act as if it were an order
made under section 101 of this Act.”
if an order under s 101 had been made. This is subject to specific qualifications made by case law.449

6.6 The effect of an order for custody

Critical here is what the Act says about the effect of an order for custody being made in respect of a child. This is prescribed by s 104(1)(a) and (b):450

(1) Where the Court makes an order under section 101 of this Act placing a child or young person in the custody of any person, —

(a) That person has the role of providing day-to-day care for the child or young person as if a parenting order had been made under section 48(1) of the Care of Children Act 2004 giving that person the role of providing day-to-day care for the child or young person; and

(b) Except to the extent that they are preserved by the Court in any order made under section 121 of this Act, all the rights, powers, and duties of every other person having custody of the child or young person shall be suspended and shall have no effect.

These provisions are pivotal for two reasons: firstly because of the nexus made between COCA and parenting orders and, secondly, the effective removal of the bundle of rights relating to day-to-day care that the parents of the child had up until the making of the order. The consequence of the making of an order for custody is that the person who has the benefit of the order steps into the shoes of the parent of the child and assumes the responsibilities that that person had for the provision of day-to-day care of the child.

449 See LC v Ministry of Social Development [2008] NZFLR 828 (CA). See also the obiter comments made in Chief Executive v N, above n 205, where observation was specifically made about the appropriateness of the Chief Executive of placing a child at a significant distance from parents when the order is one under s78 and the case is only just beginning. Similar comments were made in JJHW v Chief Executive of the Ministry of Social Development [2012] NZFC 1053, at a judicial conference prior to the final hearing; see paragraph [16] of the substantive judgment: “The Court records it concern that [E]… may be relocated to Christchurch to prior to hearing the issues of care and relocation. Such a move, whether permitted or not, would pre-empt the Court’s directions and should not be undertaken”.

450 Section 104(2) makes a statutory connection with COCA for the purpose of the Hague Convention. Neither it nor the remaining provisions of the section are relevant for present purposes. The significance of the reference to s 92 of COCA is that it brings into play the provision of COCA relating to international child abduction. Hence a child who is in the custody of the Chief Executive under s 101 may the subject of proceedings brought under those COCA provisions. See also s 114(2)(b) where it is made clear that an order for sole guardianship is of the same effect. The section is reproduced in Appendix One. Emphasis added.
The words ‘as if’ operate in the same way the word ‘deem’ would in that circumstance: to ‘deem’ is to extend the meaning of a word or an expression beyond its normal connotation.\(^{451}\) It operates as a “useful shorthand device to provide that the legal consequences normally attaching to one concept will, for a certain purpose, attach to another concept.”\(^{452}\) This is not to suggest that there is any legal ‘fiction’ involved; rather, the effect of the words is to do no more than to tell the reader the consequence of any order for custody once made.\(^{453}\)

The effect of s 104(1)(b) emphasises that consequence by making it quite clear that the responsibilities of the parent of the child for the provision of day-to-day care are ‘suspended and of no effect.’ This does not, as a matter of law, formally remove those responsibilities. Rather, it simply and starkly takes away the power for the time being, to operate or exercise them for the duration of the order\(^{454}\) – which might be until the child attains the age of 17 years or until earlier discharge of the order, when the child could be returned to their care or placed with new permanent caregivers.\(^{455}\)

The notion that ‘care’ is the essential framework conferred by the making of a custody order is invoked by the reference to COCA. This is further reinforced by the changes wrought by COCA when compared with the Guardianship Act 1968. The definition of ‘custody’ – with its reference to ‘possession and care’ was abandoned, together with the corresponding reference to ‘access’. There was instead a fundamental move from that paradigm to the welfare and best interests of the child being defined by reference to parental responsibility and encapsulated by duties as guardians, by (implicit) reference to UNCROC, and to the specific and individual circumstances of the specific child and there being no presumption as to how a child’s care should be shared between the now separated parents.\(^{456}\) This means that

\(^{452}\) Burrows and Carter, at 430.
\(^{453}\) Burrows and Carter at 433. This is in contrast, for example, to the operation of s 16 of the Adoption Act 1955 which deems the adopted child to “become the child of the adoptive parents.” This is an appropriate usage of what is meant by ‘deem.’
\(^{454}\) This will be the case is the situation even when the child is placed back at home by the Chief Executive under the s 101 order. Until the order expires, the Chief Executive still has legal authority as custodian. The child could remain in the custody of the Chief executive until he attains his 17th birthday. Discharge might not occur be until the child attains the age of 17 years, unless discharge of the order occurs earlier, when the child is returned to her care or, placed with new permanent caregivers.
\(^{455}\) See ss 108 and 109. The order can also expire should the child marry or enter into a civil union, or be adopted by any person other than his parent. When the order expires, custody reverts to the person having custody immediately before the order was made.
\(^{456}\) Inglis, above n 183.
the Chief Executive, by virtue of the s 101 order is as responsible for the day-to-day care of
the child as is any parent is in respect of their own child.457

One further possible effect of a custody order should be noted. When a child is placed in the
custody of the Chief Executive, there are few, if any, limitations placed on the ability of the
Chief Executive to place that child where the Chief Executive considers appropriate, subject
to the caregivers being approved as required by s 362. This arises as a consequence of the
operation of s 104(2) which confers on the Chief Executive:

…sufficient authority for any [constable] or any Social Worker or any other person
authorised in that behalf by the [chief executive] to place the child or young person to
whom the order relates—

Where the order places the child or young person in the custody of the Chief
Executive, with such person, or in such residence, as the principal manager of
the Department for the area in which the Court is situated may direct.458

Thus, when a child is in the custody of the Chief Executive, it is arguable that the Chief
Executive has power to place the child anywhere in New Zealand whether in a residence or in
an approved placement with caregivers, and irrespective of where the parents may live.459 In
contrast, under COCA, in instances of parental separation, this would involve relocation and
constitute an incident of guardianship.

6.7 The nomenclature distinction

COCA created a single order, the ‘parenting order’ which can be for either day-to-day care or
for contact. It thus moved away from the definition of ‘custody’ as was prescribed in the

457 Appointment of the Chief Executive as a guardian of the child is not essential prerequisite to this task but
where that appointment is made there is an emphasis added to the parenting role.
458 The emphasised words make this an interesting provision. It confers on the responsible manager for CYPF
in the area covered by the Family court which made the order for custody to exercise the discretion as to
placement. In some instances it is quite common for an order for custody to be made by a Family Court Judge
located outside of the area responsible for the case social work. For example, in the Auckland region, a without
notice s78 custody order may be made by the responsible duty judge in chambers in Auckland when the
proceedings have been filed in Papakura by social workers from the Papakura office. Should that child have to
be placed, the decision must be made by the regional manager responsible for Auckland as opposed to Papakura.
The power is presumably delegated.
459 This is fully discussed in chapter 9.2. It is sufficient to note that the basis for this lies in the powers
accompanying the making of a custody order (whether under ss 78 or 101) when seen in the context of s 104 of
the Act and s 16 of COCA (and noting in particular subsections (3) and (4). See also Chief Executive v N, above
n 205. The discussion there highlights the ever present tensions involved in placing a child.
Guardianship Act 1968, and still found in the Act. In so doing, a profound conceptual shift was brought about by COCA: the notion of ‘possession’ - of ownership and control - was replaced by that of the provision of day-to-day care for a child. Equally, the concept of ‘access’ – of being granted a visit to a child by the person having custody of that child – was replaced by the more embracing concept of contact – within the framework of a parenting order. That this occurs within the ambit of the parenting order illustrates the fundamental change sought to be effected by COCA – acknowledging the roles that each parent of a child plays in respect of the child, and of seeing the child as an individual and not as an object.

The enactment of COCA saw the law move still further away from the notion of parental rights in respect of children, a process that had been in motion since the last years of the 19th and the apogee at common law at least of parental (and in that instance, paternal) rights.\(^{460}\)

Whilst this may be an appropriate change in approach in terms of private law, is it an appropriate fit for a public law statute like the Act and the role that the Chief Executive plays? In part, the answer may lie in the discrete primary dual foci of the Act, addressing as it does both the care and protection of children under Part II\(^{461}\) and young people who have committed offences under the Part IV youth justice provisions. In each of those instances, the Chief Executive will be the custodian in law. In some situations the child or young person will need to be placed in a specific type of ‘residence.’\(^{462}\) This will see the child effectively incarcerated and detained – whether the placement is in a care and protection residence\(^{463}\) or in a youth justice facility.\(^{464}\)

### 6.8 The CYPF Act and the ‘possession/care’ dichotomy

It is my premise that the definition of ‘custody’ in s 2 of the Act was deliberately not amended when COCA was enacted, as Parliament intended to maintain the distinction between ‘possession’ and ‘care’. The Chief Executive continued to be charged with the task

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\(^{460}\) See Re Agar-Ellis (1878) 10 Ch.D.49. There, the father was regarded as the natural guardian of the child and therefore had a presumptive right to custody, the presumption being rebutted only if found to be unfit to care for the child. This case can be compared with the outcome of one which was heard in Chancery (equity) where the welfare of the child was an important consideration: \(R v Gyngall\) [1893] above n 272.

\(^{461}\) Embracing within this those 10–13 year old child offenders who are the subject of proceedings under s 14(1)(e) of the CYPF Act. They have and who have “committed an offence or offences the number, nature, or magnitude of which is such as to give serious concern for the well-being of the child”.

\(^{462}\) See the definition of residence in s 2 of the CYPF Act.

\(^{463}\) A child may be placed in secure care in a care and protection residence under ss 367-383A of the CYPF Act.

\(^{464}\) Under the youth justice provisions placement occurs by way of a custody order under s 238(1)(d) of the Act.
of both ‘possessing’ and ‘caring’ for the child. This is irrespective of whether custody is
being considered under the care and protection or the youth justice provisions. It is
conceptually necessary in both respects for the Chief Executive, when custody is assumed of
the child to take ‘possession’ of that child.465 At the same time, the Chief Executive must
also provide ‘care’ for the child.466 That this is so is also illustrated by the fact when a
custody order is made under s101 that order can be enforced by the order itself being
presented.467 There is no need for the custodian to obtain a warrant from the Family Court to
enforce that order should enforcement be necessary.468 Section 104(2) provides “sufficient
authority for any member of the Police or any social worker... to place the child” and
s 104(3) authorises the use of reasonable force to effect that placement. Section 105 goes on
to authorise social workers to remove a child from any placement, using reasonable force as
may be necessary and to enter and search any premises for the child.469

Section 362 reinforces this notion as this provision authorises the Chief Executive to place
any child:470

…who is the care or custody, or under the guardianship [of the Chief Executive] in the charge
of any person whom or organisation which the Chief Executive: considers suitable to provide
for that child’s … care, control and upbringing.

This is further exemplified by the youth justice provisions. For example, s 235(1) empowers
a member of the Police who arrests a child or young person to “place that child or young
person in the custody” of the Chief Executive. That placement is deemed by s 235(3) to be
“sufficient authority for the detention of the child or young person by a social worker or in a
residence.” Similarly, s 238(1)(d) authorises the Youth Court to make an order placing the
young person in the custody of the Chief Executive. If that order is made, then s 242 makes
it clear that the order shall be “sufficient authority” for the child or young person to be

465 See s 104(1)(b).
466 This aspect is given effect by s 104(1)(a).
467 Or s 78 or s 102.
468 Other than a place of safety warrant that may be issued under ss 39 and 40, the only occasion when a warrant
is required is when an access order made under s.121 is required to be enforced. An application can be made
under s 122 for this purpose.
469 See s 105(1d) for the power to remove and to use such reasonable force as may be necessary, and s 105(3)
for the power to enter and search any dwelling house, premises, building, aircraft, ship, carriage, or place.
470 In addition to those others who may also be the beneficiary of a custody order made in respect of a child,
namely, the chief executives/directors of any Iwi Social Service, a Cultural Social Service or a Child and Family
Support Service. Emphasis added
detained in a residence or, if specific circumstances can be made out, “in Police custody for a period not exceeding 24 hours at any one time.” If a young person subsequently absconds from the placement, he or she may face a charge under the Crimes Act 1961 of escaping custody. This presents a substantive and coercive aspect to the notion of possession.

This expanded concept of custody embracing both possession and care, and running across care and protection and youth justice is reinforced by consideration of Part VII of the Act. This contains specific statutory authority for the Chief Executive to place a child who is in his custody with an approved person (or organisation) suitable to provide for the child’s “care, control, and upbringing” and to establish residences for the purpose of providing for the “care and control” of children. This Part also authorises the Chief Executive to place children in a residence and in secure care. Part VII also covers the searching and discipline of children who are placed in a residence, dealing with children who abscond, and for the Chief Executive to exercise control over a child’s earnings and other income.

6.9 Guardianship orders

When the Chief Executive assumes custody of a child who is not going to be returned to its family it is usually, but not always, the case that an order for guardianship will be made as well. This will be either as sole guardian, but more usually as a guardian in addition to the child’s existing guardian(s). Section 114 of the Act provides that appointment as a guardian

471 A senior social worker or a senior sergeant or commissioned police office officer must be satisfied on reasonable grounds that the child or young person is likely to abscond or be violent and that the Chief Executive does not have suitable facilities for the detention of the child or young person.

472 Section 362.

473 Section 364. A residence may also be established for the purpose of remand, observation, assessment, and short-term training; to provide special training and rehabilitation; of providing periodic training, recreational, educational, or vocational activities; and the provision of secure care.

474 Section 365. This captures all children in the custody of the Chief Executive. The section also refers to children who are under guardianship without differentiating between sole guardianship and additional guardianship. If the Chief Executive has status only as an additional guardian (which occurs and is particularly important in respect of those aged 17 years and over who continue to have a care and protection issue which requires the involvement of the Chief Executive) and not custodial status as well, then the power cannot be exercised. (See the discussion in respect of Zeppelin were this is an issue.)

475 Section 367. This covers children in the custody of the Chief Executive other than by operation of a temporary or extended care agreement. It embraces both care and protection and youth justice. Secure care involves the locking up of a child who has been placed in a residence to avoid the child absconding (subject to certain criteria being met) or to prevent the child from behaving in a manner likely to cause physical harm to the child or to some other person.

476 See ss 384 - 384K.

477 See ss 385 and 386. Such children may be detained without warrant by a social worker or a member of the Police and returned to a residence or person providing care.

478 Section 391.
is as if the person had been appointed as a guardian of the child under s27 of COCA.\textsuperscript{479} This status is needed because certain decisions concerning children can only be made by a person who is a guardian. These include decisions about a child’s religion and religious upbringing,\textsuperscript{480} non-routine medical care and enrolment at school.\textsuperscript{481} The Chief Executive therefore requires that status in respect of children who are placed in his custody as the powers conferred by the custody order do not go so far as to displace those incidents of guardianship.\textsuperscript{482} This has a particular emphasis when the child is to be permanently placed. This is not a view universally shared by social workers or their legal advisers.\textsuperscript{483} However, as the Act refers to and defines guardianship by reference to COCA it is necessary to look to COCA for the more specific discussion.

\textsuperscript{479} Correlating to s 104 of the Act but with significant differences arising when the appointment is as additional as opposed to sole guardian.

\textsuperscript{480} It is this writer’s experience that on occasion the Chief Executive will place children with approved caregivers who have a particular religious faith. Those caregivers will take the child to their place of worship or otherwise involve the child in matters involving the church. It is extremely rare for parents to be consulted in this respect.

\textsuperscript{481} The latter is a debatable point as s 105(1)(b)(ii) seemingly authorises the Chief Executive to place a child in his custody “in any school or other institution that provides care or training or physical or mental health care”. It is my view that the power to place a child in any school cannot embrace the enrolment of a child in different school from which the child was attending prior to being placed in the custody of the Chief Executive.

\textsuperscript{482} See the decisions in \textit{Chief Executive v CM} \cite{CM} and \textit{In the Matter of AHJR}, above n 459 and \textit{JJHW v Chief Executive of the Ministry of Social Development} above n 450. The former two decisions, correctly with respect, identify the critical distinctions between guardianship and custody in terms of the Act. The latter decision agrees with the analysis proffered by those two cases. With respect, the cases are correct. Inglis, above n 183, at 686 comments on the decision in \textit{Chief Executive v CM} and considers it unfortunate if the case was to be used to support an “over-rigid demarcation between guardianship and custody. In that case counselling was instituted by the Chief Executive for children. Not all guardians were consulted. Inglis proceeds on the basis that the proposed intervention was for the benefit of the children, and if “benign” could be encapsulated within the care component of custody. In his view, the basis is pragmatic: If the counselling was benign then it could have simply be done without any particular application having to be made to the Family Court for it to occur should the guardians have been consulted and not agreed with the counselling taking place. However, in \textit{In the Matter of AHJR} (above, n 460) the Court held went onto consider the custodial power of the Chief Executive to move a child in a situation that at private law would involve relocation and therefore be a matter of guardianship. This particular finding was later overruled by the High Court in \textit{Chief Executive v TK}, above n 459. This decision itself was partly overruled by the Court of Appeal in \textit{L C v Ministry of Social Development} \cite{LC} on a slightly different point relating to conditions attaching to custody orders.

\textsuperscript{483} Inglis, above n 183, at 686, goes on to excuse social workers for confusing the legal distinctions given the “very considerable powers” assumed with a custody order and states that they could assume, wrongly, that there is not much distinction between a guardianship order and a custody order. Inglis here is simply wrong, both in law and fact. That is in fact a reality. However, the decision in \textit{Chief Executive v CM}, above, n 483, provides the necessary counter-balance where at paragraph [31] it was stated: “The Department’s social workers are used to taking control; they are used to having significant power. Within the culture that develops from that pattern of experience, it is easy to understand how the niceties of distinction between guardianship rights and custody rights get overlooked.”
When a child is born in New Zealand, both the mother and father of that child will, ordinarily, be responsible for the child and the provision of day-to-day care. This arises from their status as ‘guardians’ of the child. ‘Who’ is a guardian is prescribed by s17 of COCA. Sections 15 and 16 respectively define what constitutes guardianship and what is embraced within the exercise of guardianship. Section 15 defines guardianship by reference to three limbs. Firstly, this is having “all duties, powers, rights and responsibilities that the parent has in relation to the upbringing of a child.” This is not a helpful definition being circular, with “parental powers for the most part [arising] from the parents’ status as their child’s guardians.” Secondly, that a guardian has “every duty, power, right and responsibility that is vested in the guardian by any enactment.” This is difficult, as to understand the obligations conveyed, a guardian must have access to the various statutes that impose the obligations. The same problem applies to the third limb. This refers to “every duty, power, right and responsibility that, immediately before the commencement on 1 January 1970 of the Guardianship Act 1968, was vested in a sole guardian by an enactment or rule of law.” Precisely what is now embraced by this aspect of the definition is unclear as there “are few, if any, elements of the common law… that have not been “absorbed or replaced” by COCA.”

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484 Both mother and father of the child will be guardians if the mother was married to, or in a civil union with, the father of the child at any time beginning with conception and ending with the birth of the child, or living with the father in a de facto relationship during that same period. Further, the definition of ‘guardianship’ provides that a guardian has all of the duties, powers, rights, and responsibilities that a parent of the child has in relations to the upbringing of the child. See s 15(1). The actual exercise of guardianship includes the role of providing day-to-day care [s 16(1)(a)] unless a court order provides otherwise – s 16(3).

485 The expression ‘parent’ is not defined in either the Act or in COCA. The immediate context is to the mother and father of the child. It will also embrace those who are not the biological mother and father but those who provide day-to-day care and have been appointed as guardians under s 27 of COCA.

486 ‘Upbringing’ was defined in the Guardianship Act 1968 as including education and religion. This has not been reproduced in the Care of Children Act definition. It therefore brings into play its everyday meaning – which embraces education, religion and nurturing. Inglis, above n 183.

487 Section 15(a).

488 Ludbrook and de Jong, above n 283, at 113.

489 Section 15(b). These enactments include the Education Act 1989 and the duty to enrol the child at school between the ages of 6 and 16 years: to provide health care – the necessities of life for so long as the child is under the age of 16 years; the obligation not to abandon the child if under 6 years of age, an obligation imposed by the Crimes Act 1961: leaving a child unsupervised if the child is under 14 years of age; Summary Offences Act 1981: the registration of the name of the child following the birth of the child; Births, Deaths, and Marriages Registration Act 1995; children under the age of 16 requiring the consent of a guardian to get a passport; Passports Act 1992: consent of a guardian to the adoption of the child; Adoption Act 1955; consent to the marriage of a child who is aged under 20 years; Marriage Act 1955: Children under the age of 18 years cannot enter in a civil union without the consent of a guardian; Civil Union Act 2004 (Ludbrook and de Jong, above n 283).

490 Inglis, above n 183, at 323.
Further guidance is provided by s 16 describing the exercise of guardianship. Importantly, it specifically includes the role of providing day-to-day care for the child,\textsuperscript{491} and of “contributing to the child’s intellectual, emotional, physical, social, cultural, and other personal development.”\textsuperscript{492} Further, a guardian must determine for or with the child (and help the child to determine) “questions about important matters affecting the child.”\textsuperscript{493}

Section 16(5) makes it clear that when exercising the incidents of guardianship, guardians must act consult and act jointly and, importantly, that the incidents may continue to be exercised irrespective of whether the child lives with the guardian.\textsuperscript{494} This not only captures parents who have separated, but significantly, the parents of those children who have been placed in the custody of the Chief Executive under 101 of the Act. The parents, being guardians, therefore, have the right in law to provide for the child’s upbringing, save for the component of day-to-day care.\textsuperscript{495}

When the Chief Executive has sole guardianship, that status subsumes, as a matter of law, the totality of the bundle of rights constituting guardianship, including day-to-day care of the child for the duration of that order.\textsuperscript{496} The Chief Executive, when so appointed, has no need for separate custodial status.\textsuperscript{497} However, it is rare for the Chief Executive to seek appointment as a sole guardian. It should occur more often - for the reasons enunciated in \textit{Chief Executive v CM}.\textsuperscript{498} When appointed as sole guardian, the Chief Executive fully stands in the place of natural parents and guardians of a child.

\textsuperscript{491} Section 16(1)(a).
\textsuperscript{492} Section 16(1)(b).
\textsuperscript{493} Section 16(1)(c). Section 16(2) then defines these ‘important matters’ as including, without limitation the name of the child and changes to that name, changes to the child’s place of residence, including changes in residence that may affect the child’s relationship with his or parents and guardians, non-routine medical treatment, where and how the child is to be educated, and the child’s culture and religious denomination and practice.
\textsuperscript{494} Section 16(3).
\textsuperscript{495} I am assuming both are guardians as a matter of law. See ss 17 – 19 of COCA.
\textsuperscript{496} See s 114(2) of the CYPF Act. This includes the rights of day-to-day care that are ordinarily encompassed in that bundle of rights. Any person except the Director of a Child and Family Support Service may be appointed as sole guardian.
\textsuperscript{497} This is also made clear by s 114(2)(c) which deems the child to have been placed in the custody of the Chief Executive under s101 and with the provisions of ss 104 – 107, ‘so far as applicable and with all modifications’, applying to the appointment as sole guardian.
\textsuperscript{498} Above n 484. The decision identifies situations where the Chief Executive should consider appointment as sole guardian. Where this occurs, it lays a possible evidential foundation for a later application by the child’s new permanent caregivers to dispense with the guardianship of the birth parents.
Where the Chief Executive is an additional guardian, the s 101 order removes the day-to-day care component from the bundle of rights constituting guardianship of the parents. In all other respects, the status of guardianship is one that is shared with the birth parents. The Chief Executive is therefore required to work with the birth parents in the upbringing of the child – as required under ss 15 and 16 of COCA. This operates as a matter of law from the moment a child or young person is placed in the custody of the Chief Executive (and if the Chief Executive is not a guardian then those decisions remain the preserve of the parents). At an apocryphal level it is said that the Chief Executive often fails to truly honour the responsibility of joint consultation and decision-making and instead makes the decisions without reference to the birth parents. This has at least three significant down-stream consequences when a child is permanently placed: firstly, it implies for outward appearances that constructive consultation had taken place; secondly, it implies for the new permanent caregivers that they too will be able to so engage with the birth parents (as in law they must), and, thirdly, in the event that the birth parents are obstructive on guardianship matters, it takes away a possible evidential plank for any application that may be made to dispense with the birth parents guardianship under s 29 of COCA.

6.10 Duration of orders

When does a custody order cease to have effect? This is prescribed by s 108 of the Act: it can expire by the passage of time, when the young person turns 17 years, or when the child marries or enters into a civil union or, is adopted. For present purposes this is relevant solely because of the prescribed age limit of 17. This reflects Parliament’s intention that care and protection issues for children may subsist well into the child’s adolescence (and irrespective of whether the Chief Executive’s initial intervention occurred when the child was born or soon thereafter or later, including the adolescent years). The duties and obligations of having that parental status thus continue. Similarly, when the Chief Executive is appointed as a guardian of a child, that status may continue until the child turns

499 Personal experience, and arising from discussion with colleagues over a number of years. See also see Chief Executive v CM, above n 483.
500 Section 108(a) – as with a s 102 order.
501 Section 108(c).
502 Section 108(d) and (e).
503 This is contrast with the age of 16 years at which a parenting order under COCA expires, unless the Court finds there are special circumstances necessitating the order continuing beyond that age.
20 years of age.\textsuperscript{504} The Act reflects the Guardianship Act in that both provided for guardianship to run until a child attained the age of 20 years. The Act was not amended in this respect with the passing of COCA (where the age for the conclusion of guardianship was reduced to 18 years, reflecting the injunction of UNCROC). The Chief Executive is thus in no different situation from any parent who is a guardian and who has a duty and obligation to continue to exercise the incidents of guardianship until the child turns 18 years of age.\textsuperscript{505} The significant difference is that the duty of the Chief Executive to the child continues beyond the time when that of a birth parent and guardian elapses. Many children are of course permanently placed well before they attain the ages of 17 or 20 years. That they may be so placed does not derogate from the duty owed by the Chief Executive to address the care and protection and care issues that may travel with the child throughout childhood and adolescence. The change of legal status from the Act to COCA means nothing in itself.\textsuperscript{506}

The ostensibly anomalous situation is reached whereby a child could have, for example, three guardians through to the age of 18 years (birth mother and birth father and the Chief Executive) and one guardian from the age of 18 through to 20 years – the Chief Executive. There is, in fact, good reason for guardianship under the CYPF Act to continue through to the young person attaining the age of twenty years. This reflects a deliberate Parliamentary intention: its acceptance that in some circumstances care and protection issues subsist beyond the young person attaining the age of 17 years. An application by the Chief Executive to be appointed as guardian cannot be made in respect of young person of or over the age of 17 years. However, where a declaration has previously been made and care and protection issues subsist for the child beyond the age of 17 years, the existing guardianship status provides a vehicle in law (and an accompanying duty of care) for the Chief Executive to remain involved with that young person and assist the transition of the young person from care through to her attaining the age of 20 years.\textsuperscript{507} This is particularly so in respect of those

\textsuperscript{504} See section 117(1). An order for guardianship will also expire if the child marries or enters into a civil union or is adopted by a person other than its parents.

\textsuperscript{505} The age of a child for guardianship purposes is prescribed by the definition of ‘child’ in s 8 of COCA. It is defined as meaning “a person under the age of 18 years.”

\textsuperscript{506} An observation pertinently also made by Nicola Atwool and Tracey Gunn “Care and Protection Orders and CYFS” (New Zealand Law Society Seminar, Wellington, 2012).

\textsuperscript{507} Problems may arise where the young person is on the cusp of turning 17 years and the Chief Executive does not have guardianship status and it is considered that such status should exist. The Chief Executive cannot simply make an application for an order appointing him as guardian; rather there must be an application brought under ss 125 and 127 of the Act to vary the existing CYPF order(s). See the discussion in Chief Executive of
young people suffering significant cognitive delay and who may therefore be candidates for orders under the PPPR Act.\textsuperscript{508}

6.11 The Care of Children Act 2004

COCA provides the private law legislative framework in respect of the relationship between children and their parents. Section 48 of COCA makes provision for the day-to-day care of children. It is a provision that is invoked when parents of a child separate: they may agree to separate and their agreement may make provision for care of their children by reference, be it explicit or implicit, to s 48. The separation may be acrimonious and recourse may be made to the Family Court. On those occasions the Court will make an order under s 48 prescribing how day-to-day care is to be undertaken – whether in terms of an order in favour of both parents for day-to-day care or by an order for day-to-day care in favour of one parent and an order for contact in favour of the other parent.\textsuperscript{509} Parenting orders may also be made when someone other than the parents of a child assume that role – aunts, uncles, step-parents, grandparents – and when a foster parent who has assumed permanent day-to-day care of a child formerly in the care of the Chief Executive makes application for a parenting order.

Section 48 is of little practical assistance in explaining the effect of the parenting order. This is at least in terms of what is contemplated by s 104 of the Act and its reference to s 48. Section 48 covers both the provision of day-to-day care of a child between the parents of that child and for contact by a parent who does not have day-to-day care. The section does not explain what is meant by ‘parenting’ or of the duties and responsibilities of a parent when exercising day-to-day care of a child. Although ‘day-to-day care’ is defined in s 8 of COCA, the definition does not take us any further: “day-to-day care includes care that is provided only for one or more specified days or parts of days.”

Day-to-day care must therefore be given its every day meaning. Put simply, this involves looking after a child on a daily basis and providing the essentials of life when the child is in the care of the person concerned. The expression ‘care’ is not defined in COCA. Generally,

\textsuperscript{508} See for example Cooke, above n 37.

\textsuperscript{509} The responsibility for day-to-day-care can be shared. This can equally in terms of time or unequal. The emphasis is on the ‘responsibility’ of being the parent, not necessarily on the time the parent has with the child. To recall, ‘contact is defined as “in relation to a child, all forms of direct and indirect interaction with the child.”
it is used in both the sense of the child being ‘nurtured’ – for example, and in accordance with the dictionary definition - “Care for and encourage the growth or development of”, but also in the sense of ‘possession’ as conveyed by the now replaced term ‘custody’. The latter point is emphasised by the enforcement provisions of COCA – and in particular the obtaining of a warrant to enforce, if necessary, the right of day-to-day care. However, all commentators note that COCA marks a deliberate attempt to move away from the possessory (win – lose) notions of custody and access and to an outcome (consistent with the welfare and best interests of the child) that sees both parents, in the event of separation, having the responsibility of caring for their child. This would also enable (and demand) greater respect for the guardianship rights of both parents. The role a parent carries out towards a child under COCA reflects what is embraced by a combination of the various incidents of guardianship and what is caught by the more discrete day-to-day role in providing care. This corresponds with the prospective responsibility accruing from the social contract and the broader duty to attend to the general welfare of the child. That the nexus between s 104(1)(a) of the Act and s 48 of COCA relates to the nurturing aspect of care is made plain by the statutory regime. Relevant are ss 104(2) and (3), 105, and s 107 of that Act. The first two prescribe matters relating to the custodial powers of the Chief Executive, while the latter confers discretion about contact in the absence of a specific order made under s 121.

6.12 The duties of a parent and the Chief Executive

This leaves open what is involved in being a parent and what a parent, including the Chief Executive in his capacity as a statutory parent, must provide to their children in respect of the provision of care. Is a direct comparison between the Chief Executive and a natural parent possible? The statutory analysis suggests this is so. However, on consideration, there are difficulties in discussing the duties required of a parent of a child and asserting that the Chief Executive’s duties and obligations are the same. Firstly, the Chief Executive never actually

510 Pearsall, above n 25, at 1273.
511 Cooke, above n 34; James, above n 242; Zainab Al-Alawi (ed) Brookers Family Law — Child Law (online looseleaf ed, Brookers); Inglis, above n 183; Ludbrook and de Jong, above n 283.
512 Section 106 is to the same effect as s 105 but embraces Iwi Social Services and Family and child support Services.
513 The person with the benefit of a s 101 order (or the Chief Executive as sole guardian) can determine access in the absence of a specific order made under s 121. Thus the contact portion of a parenting order under s48 of COCA cannot apply to a CYPF custody order. As well, and to merely emphasise the point, all other aspects of COCA, save for the provisions of Sub-Part 4, International Child Abduction do not apply to children who have a custodial status under s 101 of the CYPF Act.
parents the child in question, but does so through third party agency and delegation. The
Chief Executive therefore fits, at least superficially, the description of a ‘corporate parent’, a
phrase used in England to describe the role and tasks of the local authorities who have the
responsibility for care and protection of children, albeit within a national statutory
framework. Secondly, the parenting task can be relatively intangible. Clear illustrations of
inadequate parenting arise in those cases where the Chief Executive intervenes in families
using his statutory powers: these usually involve discrete instances of abuse and/or neglect.
Cases in the Family Court under COCA often do not involve poor parenting per se, but do
involve a comparison of parenting and an examination of qualities and attributes that go to
identify which of the competing parents can best meet the welfare and best interests of the
child. Thirdly, children who come into care and who are not going to be returned to their
parents are variably highly damaged children as a consequence of the abuse and neglect they
have experienced. They present with far greater parenting demands than children who are
not in care, having a greater range of needs (including chronic medical conditions, mental
health issues, developmental and educational delay).

6.13 The principle of minimum intervention

Inextricably linked to this as part of the statutory context is the operation of the principle of
‘minimum intervention’ that is found in the Act. The principle is usually seen operating at

514 See for example R Bullock and others “Can the Corporate State Parent?” (2006) 28(11) Children and Youth
Services Review 1344; Department of Education and Skills (UK) If This Were My Child: A Councillor’s Guide
To Being A Good Corporate Parent (Department of Education and Skills, Wales, October 2003); Department of
Education and Skills (UK) Every Child Matters: Statutory Guidance On The Duty of Local Authorities To
Promote The Educational Achievement of Looked After Children Under Section 52 of The Children Act 2004
(Department of Education and Skills, UK, 2005); Judith Masson above, n 32; C Hannon, C Wood and L
Bazalgette In Loco Parentis (Demos, London, 2010).

515 The statement remains valid notwithstanding possible differences in different jurisdictions that relating to
specific matters such as the age at which a child has entered care, the reasons why that occurred, and the type of
care that the child has experienced after entering into care and before being found a permanent placement. See
for example, amongst many, Michael Tarren-Sweeney and Phillip Hazell “Mental Health of Children in foster
and Kinship Care in New South Wales, Australia” (2006) 42 Journal of Paediatrics and Child Health 89; Gillian
Schofield and Mary Beek Achieving Permanence in Foster Care (British Association for Adoption and Foster
Care, London, 2008); Mike Stein and Annick-Camille Dumaret “The Mental Health of Young People Aging
Out of Care and Entering Adulthood: Exploring the Evidence from England and France” (2011) 33 Children and
Youth Services Review 2504-2511; J Triseliotis “Long-term Foster Care or Adoption? The evidence examined”
(2002) 7(1) Child & Family Social Work 23-33, at 24; Chief Executives of Ministries of Social Development,
Health, Education, and Justice and the Department of Building and Housing Briefing to the Incoming Minister,
Social Sector Forum (Ministries of Social Development, Health, education, and Justice and the Department of
Building and Housing, Wellington, 2011).

516 See s 13(b)(ii): ‘The principle that the primary role in caring for the child lies with the child’s family, whanau
and family group, and that accordingly “intervention into family life should be the minimum necessary to ensure
a child’s… safety and protection.”
the time of intervention in the lives of families, which is not my focus in this thesis. However, does the principle apply only at the time of initial intervention by the Chief Executive in a family, or does it apply across the full range (in time) of the involvement by the Chief Executive and afterwards once a child has been permanently placed with a new family? Thus when a child is in care, is the Chief Executive able, by operation of the principle to avoid providing optimal support to that child and his or her new family? Is it simply enough that a minimum provision of care or support is provided (either by the Chief Executive or the new permanent family) such that the child would not otherwise be in need of care and protection? Would it mean that in any given instance the situation for the child who is placed in a new family (and his new parents) may not be supported in addressing the child’s care and protection and care legacies?517

These are fundamental questions and raise profound implications for the well-being of children who are permanently placed. The answer notes that coercive state intervention has occurred and asks why has intervention occurred? It would be unfortunate indeed if a child was removed and then, when either in the care of the Chief Executive or with new permanent caregivers, received a quality of care that was barely or just acceptable. Just to state the proposition is to show its absurdity. More particularly, as the effect of a custody order is as if a parenting order had been made under COCA, an objective assessment of the role responsibility/duty of the Chief Executive would necessitate regard being had to the reasons why intervention occurred and the needs of the specific child in his specific circumstances being acted upon.

Further, children who are moved from their birth families and placed elsewhere, as with their peers who remain in the care of their families will, in all likelihood, go on to become parents themselves. Brown refers to the phrase “children are our future” and asks “what does it mean?”518 This was in the context of the “recent (apparent) upsurge in child abuse and child deaths”,519 but the point is pertinent in respect of the abuse and neglect of children and the consequence of that leading to their being placed permanently away from their birth families. What are the implications of the child’s care and protection and/or care history given that

517 This is relevant in the provision of post-COCA supports that the child and new family may provide. This is discussed below in Chapter Twelve.
518 Brown, above n 168, at 33. (The Brown Report followed on the heels of the death of James Whakaruru and pre-dated that of Olympia and Saliel Aplin.)
519 Brown, above n 168, at 33.
prospective reality? In Victoria, Australia, the Ombudsman in a 2006 report, opined that once the State has assumed responsibility for the care of a child “it has a duty to provide that child with a safe, stable placement which ensures her healthy development.” Brown implies that the duty is perhaps somewhat less, noting that to be removed from one’s family and placed elsewhere is:

… obviously … a significant event in the life of any child or young person. The minimum requirement and justification for such intervention when it is done by the State, must be that any such placement will be safer and less traumatic.”

The Laming Report also notes the “children are our future” mantra and states:

We depend on them growing up to become fulfilled citizens well able to contribute successfully to family life and to the wider society. It is of fundamental importance that the life and future development of each child is given equal importance.

A New Zealand commentator referred to the “responsibility of the State, morally, legally and as participants in international conventions, is to ensure these children [who have been permanently removed from their birth families] become enveloped within a new kinship network.” Another perspective, this time from the United States, is posited by Barth who states that it is necessary to ask: why are child welfare services delivered? This provides a signal to the question of the standard or quality of care that must be provided and the goal of care. His answer is to advance social benefit. This is addressed by reference to permanency planning (the systematic process of finding permanent homes for children in care) but which fails to consider the social and environmental factors that contribute to a child’s likely future adult success.

What is required is an “additional dimension” of a “social benefit perspective.” This requires a payback by a “return to society on the [social services] agencies involvement with

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521 Brown, above n 168, at 70.
524 Barth, above n 31.
525 Permanency planning is fully discussed in Chapter Eleven.
526 Barth, above n 31, at 245.
527 Barth, at 247.
a family is ... assessed with regard to the likelihood that the child will be more likely to contribute to (or at least not markedly detract from) society.” Why should the government as the responsible guardian for foster children have any less of a goal (aspiration) for the children in its care than the goals that natural parents have for their children? That statement is seen against the proposition that parents want their children to experience productive development and to contribute positively to the society in which they live. Barth advances that thesis because of the need for all children to have the requisite skills to survive, cope and prosper in the 21st century labour market, which they must generally face alone. There has been a simultaneous deconstruction of health and social services and the accompanying safety net they provided. Thus, children in care, with their histories of abuse and neglect, possess the exact characteristics to not succeed. To address this, the child must develop capacity for social integration and economic success – which “should also be a standard for child welfare services.” In terms of this analysis, therefore, the goal of the child welfare system in respect of children who cannot return home should be to “promote children’s development into maximally self-sufficient adults” and to achieve this end, children in state care must be provided with as many resources as are needed to support their attainment of economically successful lives.”

This all goes to support the proposition that the State has a substantive role and responsibility to the children who are in its care. The care and protection concerns – the damage done to these children which has led them to be taken into care, and the related care legacy – must be addressed as a necessary investment in the future well-being of society. The ‘children are the future’ statement is so true it is almost banal. However, it nonetheless provides the underpinning to the essential research question asked by this thesis: the response of the State to those children who have been permanently removed from their birth parents by the State and permanently placed must account for the fact that these children have been profoundly

528 Barth, at 247.
529 Barth, above.
530 This is a reality accepted by all commentators in the area. See as indicative of this Bennett, above n 43.
531 Barth, above at 248.
532 Barth, at 250. Barth is on somewhat controversial ground when he asserts at p 245 that the maintenance of psychological, kin, ethnic or cultural continuity should be a “by product of the welfare system only when necessary to achieve developmental goals or when the prior goals are clearly achievable.” His further assertion that to achieve the desired outcome, placements for children in care should have factored into them those physical, affective, cognitive and environmental aspects that are most likely to produce a self-sufficient adult is more orthodox.
abused, but also represent the future and there is accordingly a corresponding imperative to address the consequences of that abuse so as to ensure that those children do not themselves become the parents of children who also get removed from by state.

6.14 A parenting checklist

A helpful description of what is involved in being a parent comes from the principles set out in the decision in *D v W*.\(^{533}\) These have been used a checklist by New Zealand judges in many cases under both the Guardianship Act and COCA.\(^{534}\) While:\(^{535}\)

> ...all relevant circumstances have to be identified and appropriately balanced. Any checklist, however thoroughly prepared, tends to focus attention away from factors not listed in it, so lending to each of the factors an *a priori* weighting which is not permissible, nor appropriate in a particular case.”

Where a choice must be made between competing custodial parents, a checklist of considerations derived from the *D v W* principles will usually include the following: strength of existing and future bonding; parenting attitudes and abilities; availability for, and commitment to, quality time with the child; support for continued relationship with the other spouse; security and stability of home environment; availability and suitability of role models; positive or negative effects of wider family; provision for physical care and help; material welfare; stimulation and new experiences; educational opportunity; and wishes of the child.

These factors are aspirations that the Chief Executive should equally aspire to for those children who are in his custody and are to be, or have been, permanently placed. For example, indicative of this approach, Jensen and Fraser opine that in achieving child well-being the duty of the State is to address the child’s needs to have “permanent and stable family ties,” with this embracing the child growing up in a “stable and legally secure permanent family.”\(^{536}\) The state, as part of that duty it owes must ensure that the environment provided is one of consistent nurture, support, and stimulation. Further factors include the

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\(^{533}\) *D v W* (1995) 13 FRNZ 336 at 349. The principles are set out in Appendix 2.

\(^{534}\) Albeit now within the context of the principles set out in ss 4 and 5 of COCA with there being a personalised assessment of the situation of the individual child and his circumstances as set out in s 4(2) of COCA. See for example, Inglis, above n 183; James, above n 242; Ludbrook and de Jong, above n 283; Al-Alawi, above n 511.

\(^{535}\) Inglis, above at 259. Emphasis in original.

\(^{536}\) Jensen and Foster, above n 80, at 64–66. This is in the US context, but there is no reason to confine it to that.
child having a sense of identity, an understanding of their ethnic heritage, and the development of skills for coping with racism, sexism, homophobia, and other forms of discrimination. It also includes ensuring that consequential matters arising from the care and protection and care legacies will be addressed.

Frost\(^{537}\) refers to the research carried out in 2006 with 265 young people, aged between 15 and 23 years who came from 25 local authority areas in the United Kingdom. The theme was ‘what makes the difference’. The researchers examined accommodation, support from family and friends [the quality of support, feeling independent, choice and control, and educational and financial support]; of preparation and planning [the availability of flexible, responsive advice, of knowing there was a key person there for them, and of being checked on regularly]; and education [receipt of advice and information, assistance in choosing courses/training, helping to focus on what was important, being encouraged to go to school, assistance with homework, practical help (being provided with a computer), work and volunteering experience, and positive attitudes from carers and social workers]. In more general terms, in identifying ‘what made the difference’ safety, relationships with family, positive and caring relationships with others, help with leaving care and becoming a parent were important. In identifying ‘what was best’ about the care experience, feeling emotionally secure and supported, feeling safe, having opportunities for both fun and enjoyment and for self-development, financial and material support and new friendships, bonds and social skills were noted. In terms of what ‘could have made the experience better’ the responses were the quality of care/more emotional support and understanding from people who genuinely care, stability of placement and of people, feeling part of a family, being listened to, and having financial and practical help.

In New Zealand, the Children’s Commissioner’s 2010 report discussed the needs of children in care.\(^{538}\) Ensuring that there was an effective transition from care for young people who had been in care as teenagers and not found permanent placements was identified as needing work. Recommendations in this respect included raising the care leaving age to 18 years,\(^{539}\)

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537 Nick Frost, above n 66, at 104-105.
538 Atwool, above n 52. This report is more expansive than simply addressing children who must be found a permanent placement as it embraces all children who may get taken into care and therefore includes those whose time in care may be relatively brief. See for example the recommendations at 215-223.
539 This is effectively prescribed by s 17 of the Act which provides that a s 101 custody order expires when the child attains the age of 17 years of age. The still unenacted Children and Young Persons and Their Families
passing the Children, Young Persons and Their Families Bill (No 6) to give explicit provision for permanency planning for young people approaching independence, and for CYFS in its permanency planning to give explicit attention to providing pathways to independence (and including here the identification of a support person, facilitating opportunities in education and employment, and provision of appropriate levels of financial support). For those children who could be permanently placed there was an emphasis on ensuring early decision-making and, for Māori children, the early identification of where whānau, hapū and iwi are to be found and, therefore in both instances, avoiding the risk of drift in care (finding a placement within 12 months of the child entering care) and of ensuring appropriate cultural placements are found.540

The findings of these two studies illustrate the importance of the Chief Executive within the context of the role of being a statutory parent, identifying clear objectives and goals to be achieved in respect of the children in care and especially in respect of the nurturing component of care.

6.15 Case law

Case law provides guidance to the Chief Executive. One judicial observation can be found in Chief Executive of Department of Child, Youth and Family Services v B,541 an atypical case of permanency coming before the Family Court, but one where there is judicial observation about the purpose of care when the Chief Executive has custody. It is, however, typical in that it involved a young person in care who presented intractable problems for the Chief Executive in respect of the provision of effective social work services.542 B was a child with

Amendment Bill (No 6) 2007 (183-2) would achieve this. It will not be passed. The costs involved in extending the life of a custody order to 18 years would be prohibitive.

540 Other recommendations in respect of both categories of children were made. However, they are not relevant for the purposes of this chapter.

541 Above n 195. As can be seen from the discussion set out in the following portions of the primary text, this was a case involving not only care and protection but also offending. The judgment records at paragraph [1] the judge observing that “B is now 16 years 3 months old. He was born in August 1987. On 5 November 1987 [sic] I made a declaration that B was in need of care and protection pursuant to s 14(1)(a), (b), (c), (d)(i),(d)(ii), (e), (f), and (h) of the Children, Young Persons, and their Families Act.” This must have been 1998 as (a) it would have been impossible for B to have come within the ambit of s 14(1)(d), (e) and (h) as at 5 November 1987 and his having been born in August 1987.

542 The writer was appointed to assist the Court in this case. (He was also appointed at different times to represent two other siblings of B who were also the subject of intervention by the Chief Executive which embraced custody status being obtained and the removal of those children from the family, albeit for much shorter periods of time.) The case is also indicative of many cases (in the writer’s experience) of the Chief Executive “giving up” on children who offend. Care and protection social workers want to send them to youth justice; youth justice sees the responsibility as being that of other agencies of government. The young person,
significant care and protection concerns which were beyond the ability of his family to address. These had their origins in a brain injury and family dysfunction. The Chief Executive intervened and assumed custodial status. The nature and extent of the intervention was unsuccessful and the behaviour continued beyond B’s turning 14 years of age and his formal entry into the youth justice system and his serving a term of imprisonment. On release B was still in the custody of the Chief Executive under the s 101 order. The Chief Executive sought discharge of the order, as B was 16 years of age and still in prison: the s 101 order would have a limited life as B would turn 17 years, five months after his release from prison, and effective intervention (containment, guidance and support) could not be delivered to B within that timeframe. This approach typified an often seen and marked reluctance by the Chief Executive to engage with young people who are criminal offenders but who still have a care and protection status. The judge stated:

[13] A purpose of the Children, Young Persons, and their Families Act is to support the development of children and young persons into healthy functional adults. Where parental, whānau or family resources are inadequate, or the child or young person produces behaviour which cannot be contained by the family group, then the State will intervene. The Chief Executive must consider plans for young persons from time to time, and place them before the Court for review.

B, was aged 16. He had by the date of the hearing (16 December 2003) been in the custody of the Chief Executive for over 5 years, since 1998. B was currently serving a term of imprisonment in respect of aggravated robbery and other charges. He was likely to be released in March 2004, five months before his 17th birthday. The lawyer appointed to represent B supported the plan of the Chief Executive for discharge.

The following paragraphs provide the background context to the decision:

[10] There is no doubt that B is one of the most dangerous 16-year-olds in New Zealand at the present time. By the age of ten years he was terrorising his entire family. He has a considerable reputation in the criminal world built by acts of bravado and violence. Although there have been some short hopeful patches, he has generally been continually challenging to social workers. He has physically attacked CYFS social workers or carers. The case that he is beyond help is understandable, based upon a mountain of failed interventions.

[11] Nevertheless, I am reluctant to confirm a signal to B that his future is without hope. I note three significant features. Firstly, previous interventions were based partly upon the premise that he had suffered brain damage at an early age. The fact that he does not suffer any structural abnormality of the brain may influence a fresh programme. Secondly, the fact that his father has shown a lot more interest in recent times. In [lawyer for child’s letter] Mr L’s letter … this was reported as having been regarded by the Department as a major development given B’s father’s lack of support in the past. Thirdly, the Department in conjunction with the Department of Corrections, will be engaged with B pursuant to the Reducing Youth Offenders Programme.

[12] I do not regard the fact that a young person has been sentenced to a term of imprisonment as sufficient reason, of itself, or even when added to a significant history of failed interventions, to persuade me to discharge the custody order.
The observation about supporting children to become healthy functional adults where families are not able to do this necessitates the intervention by the State, was no more than a reminder to the Chief Executive of one facet of his duty to those who are in his custody and who cannot safely return home. Placing this young person in an alternative family had not worked; the duty therefore was to do what could be done to effectively achieve a transition from the CYPF Act.544 The application for discharge failed.

A second case, *JG v Ministry of Social Development*,545 involved an application to discharge a s 101 order in favour of the Chief Executive. The case involved a 6 year old with special needs arising from significant behavioural issues and a number of placements in care. There were two competing applicants for care. The Court decided that the Chief Executive’s custody should not be discharged given the issues in the case and, primarily, in equipping the caregiver seen by the judge as best able to care for the child with the best possible transition into her care. A psychologist reported on the skills required of a caregiver, noting a number of attributes, which apply equally to the Chief Executive given his custodial responsibilities to the child, notwithstanding that he exercises those through delegates:546

The personal, family and social resources and professional support systems to provide daily care of the child and keep a positive relationship with her over the long term;

Be fully informed of the child’s style of resisting the world in the management methods others have found that actually assist her;

Be insightful about the child and be able to gradually help her to form genuine attachments so that she can form positive interpersonal relations and interact with society in a meaningful way;

Thoroughly understand the context of the child’s family relations, be respected by that family, and be strong enough to resist pressures from that family or any other persons who might detrimentally affect her life. The child needed to be kept emotionally, socially and sexually safe within the context of family, as she grows up, especially when she becomes a teenager;

544 This writer has no knowledge of how B did make the transition from being in the care of the Chief Executive.
Have excellent management skills to minimise the child’s ability to manipulate people and to help her manage herself ("moral development") so that she becomes trusting and trustworthy;

To be able to co-ordinate and co-operate with others responsible for the child’s development and her care and management, (teachers and school staff, whānau on both sides of her family, respite carers, and other relevant professionals such as counsellors or medical personnel);

Assist the child to develop her natural musical and sport abilities, especially within a positive group or team situation.

These two cases illustrate the duty of the Chief Executive to provide for those children placed in his custody having regard to their specific identified needs. These duties overlap, but ultimately go beyond those of natural parents. There is the need to provide a home, food, clothing and education, but also extends beyond that. In the same way as a birth parent must take steps to address problems that arise for their children, so must the Chief Executive for the children he is responsible for. This task of assisting/scaffolding these children is to overcome the abuse that led to their being in care and, where necessary, when that occurred as part of their journey in care. Integral in this is the need to anticipate and provide for the child’s needs through an appropriate placement with the provision of love and emotional security. This is a profound problem for any statutory parent.

The role responsibility that is cast on the Chief Executive is to take all such necessary steps to ensure that two things occur for those children who cannot be returned to their parents: the obtaining as soon as possible of an appropriate\textsuperscript{547} new home for them, and for those (generally older) children who cannot be so placed, to ensure that equally appropriate arrangements are made for their care in effecting their transition from care to independence. These are dual facets of the same obligation. It involves the empowering of children within the care system and assisting in such a way that they are able to transcend that system, and the issues that saw them enter it, and to embark on their adult journey on a level playing field with their non-care system contemporaries.

\textsuperscript{547} ‘Appropriate’ in this context meaning a placement that comes within the objectives of the Act: the child’s age, and the child is given the opportunity to form attachments with the new caregivers. Attachment lies at the very heart of the Chief Executive’s policies in respect of permanency.
6.16 Conclusion

The analysis presented in this chapter illustrates a continuum in the legislation that has been enacted in New Zealand. In order to provide for the care of children who have been taken into care, legislation has been passed to remove, for the duration of the time these children are in care, the rights and responsibilities of their parents. This began with the Industrial Schools Act 1882 and has continued through subsequent legislation to date, culminating with the CYPF Act. The chapter has examined the interrelationship that exists between the CYPF Act and COCA in respect of the concepts of guardianship. This has considered why the expression ‘custody’ with its invocation of the dual notions of care and control was not changed when COCA was enacted in 2004, doing away with the notion of custody and replacing it with the more benign day-to-day care, a more apt description for an instance of private law. Importantly, the analysis of the interrelationship between the CYPF Act and COCA establishes that when a custody order is made by a Family Court under the former statute, the duties and responsibilities assumed by the Chief Executive are precisely those of any parent of a child under COCA. This is clear from the inclusion of the COCA definition of ‘guardianship’ in the Act and from the clear construction of s 104 of the Act is plain. The Chief Executive is given responsibility for both control and care of the child and, in respect of the care aspect, he has the same duties and obligations as any parent of a child under private law. This parenting role goes beyond that of a birth parent given the fact of intervention occurring and the reasons for that – the child is not safe in the care of its parents – and alternative permanent caregivers must be found or the child must be transitioned from care as best as can be. The parental/caregiving duty is not only to find that safe and loving permanent placement/effective transition but also to address, as any reasonable parent would, the emotional, psychological and behavioural consequences of the abuse suffered by the child. This is a duty that arises from the role of being the Chief Executive and having the specific duties that are set out in the Act.

The next chapter considers a number of related themes which go to inform the research issues. Firstly, it explores the public policy framework that was created and now operates and, by reference to the work of Fox Harding, and considers the Act within the conceptual paradigm she proffers. The chapter addresses UNCROC, children’s participation in CYPF

548 Harding, above n 19.
proceedings and case law that has considered the issues that have been raised in these contexts.
CHAPTER SEVEN

External Forces and How They Operate (Public Policy and Uncroc)

The Voice of Children in Permanency

7.1 Introduction

The issue of whether there has been, or is, any coherently articulated policy regarding how the responsibility of the State is manifested is explored in this chapter. Is there an overarching goal aspired to for children removed from their families and placed into new homes? Is that goal reflected in an existing legal or policy framework? These questions are asked as children represent the next cohort of adults and continuities exist between childhood experience and adult behaviour. It is essential therefore that abused children do not themselves become abusing adults. There is a corresponding “strong social investment in ensuring that there is adequate care and socialisation of the young in order to safeguard the future social order”.

This chapter explores public policy as it applies to children in care. Firstly, it identifies what constitutes public policy in a general sense and notes the absence of any clearly articulated New Zealand family law policy framework. A theoretical discussion follows that draws heavily on the work of Fox Harding. The New Zealand care and protection system is then considered within the context of the Fox Harding categories and the Act is examined to identify whether there is a coherent and consistent public policy operating in respect of children in care. This leads onto consideration of UNCROC and the views of children. It could be argued that the views of those who are the subject of proceedings under the Act should be given less emphasis than in private law family cases given the overarching welfare and safety considerations that apply in the child protection context. It is appropriate to ask,

549 Harding, above n 19, at 7.
550 Harding, who identifies four perspectives that underpin the public policy discussion, albeit with this being seen in respect of the overall care and protection framework and not specifically in relation to that category of children who are the subjects of this thesis.
551 In this Chapter the CYPF Act will be referred to as the ‘Act’.

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therefore, whether it is appropriate for those children to have a voice in what happens to them. This chapter considers what the literature and the law have to say on this.552

7.2 Public policy
Public policy consists of the statements and actions of governments relating to discrete aspects of the governance of society through the operation of laws and rules. It is the role of the State to prescribe policy positions in respect of issues that involve either the population at large or specific and identifiable sections of that population including the more narrow and discrete aspects of the lives of some of its citizens.553 The creation of public policy involves decision-making both within governmental organisations and outside of them including, for example, academics, business leaders, and others identified as being stakeholders.554 The formulation and implementation of policy determines the allocations of resources – in other words, of who gets ‘what’, of who gets how much [of the ‘what’], and how and when that ‘what’ is delivered. Public policy also determines who misses out in the distribution of resources. It is therefore a political activity and necessitates consideration of the options that inform the policy choices to be made. Policy-making is generally purposive and goal-orientated. It is prescribed and acted upon in order to bring about an improvement in a perceived state of affairs. It does so by achieving certain specified aims.555 The creation of policy occurs by either, or both, of the passing of new laws and the promulgation and implementation of departmental administrative guidelines and rules.556

7.3 New Zealand family law policy
The plethora of current family legislation in New Zealand dates from the Adoption Act 1955, through to the Status of Children Act 1969, the Act itself, and more recently to COCA 2004.557 There has not been, nor is there, any coherent and consistently articulated policy in

552 A related issue is that of how does the child in fact get heard? This is, however, a topic worthy of a separate paper on its own and will not be explored in any detail here.
553 The former can be seen in the tax and criminal justice systems, and through the provision of health and education services. The situation of children in care and who cannot be returned to their birth families falls into the latter category.
556 This is not to say that the goals and outcomes sought are necessarily sound or that once implemented, what was intended occurs, noting the law of unintended consequences.
557 And not overlooking the significant amendments to the Family Court and to the Act (via the Vulnerable Children Bill). The Family Court reforms are not strictly relevant to the thesis. It is enough to say that
respect of family law that has led to those laws being passed, reform being a matter of patchwork.\textsuperscript{558} These statutes are all manifestations of the specific social mores of the time and place they were enacted and it is:\textsuperscript{559}

\ldots hard to judge which of the developments in New Zealand family law have resulted from a strong general public desire for change, or the need to apply a band-aid to what is perceived to be a current problem (reactive reforms) or simply from political ideology (proactive reforms).

The history of the Act is redolent of that approach,\textsuperscript{560} with the legislative path followed between 1976 and 1989 described as illustrating “the inevitable chaotic situation that will develop in the absence of a coherent family policy.”\textsuperscript{561} The New Zealand Law Commission, in its 2000 report made a similar observation\textsuperscript{562}, and noted the “reality that some parents cannot or will not accept responsibility for the proper care of their children”\textsuperscript{563} and that where the family relationship fails, or is unavailable, “society must provide systems and resources to

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represents a further step by the State to separate itself from the lives of its citizens in resolving issues in respect of their children. This is consistent with the neo-liberal paradigm within which Act was passed and in part reflects, as does the Vulnerable Children’s Bill. See the discussion further in this chapter. The rhetoric of the reforms is couched in terms of making the family private law system more effective and in tune with the needs of children and vulnerable people. The likely reality is the reverse. In respect of the Family Court reforms the Minister of Justice posed in her paper to the Cabinet Domestic Policy Committee, the more fundamental question of “where does the role of the private citizen in resolving their family dispute end and the Family Court’s role begin?” had to be asked. Cabinet Domestic Policy Committee \textit{A Review of the Family Court} (New Zealand Government, Wellington, 19 April 2011) at 2; Peter Boshier and others “The Role of the State in Family Law” (2013) 51(2) Family Court Review 184-192; The terms of reference for the Review as approved by Cabinet were wide- ride-ranging but included the following: (v) how family law legislation and rules impact on the efficiency of the Family Court, and the delivery of professional services and costs; (vi) whether the current structure, approach and processes of the Family Court supports durable outcomes and are financially sustainable. (One critique of the proposed Bill in a submission to the Justice and Electoral Committee noted that the “very fabric of the New Zealand justice system will be destroyed. The Bill is based on flawed policy development without a statistical or research base justifying such fundamental and radical change … [T]he overriding fiscal imperative is evident throughout the Bill.” Antony Mahon, Fred Seymour, Suzanne Blackwell, Allan Cooke and Sharyn Otene “Submission on the Family Court Proceedings Bill” (13 February 2013) at 2.)\textsuperscript{558} Inglis, above n 183, at 8.\textsuperscript{559} Inglis, at 7.\textsuperscript{560} For example, in respect of the Act and its protracted genesis, see Pauline Tapp and Nicola Taylor “Protecting the Family” in Mark Henaghan and Bill Atkin (eds) \textit{Family Law Policy} (Lexis Nexis, Wellington, 2007). At 98 Tapp and Taylor refer to the tortuous policy path that took place between 1976 to 1989 and observe that despite the massive amount of work that was undertaken during that time and “the wealth of knowledge [obtained] the process of reform took “13 years and was woefully inadequate.”\textsuperscript{561} Tapp and Taylor, at 97.\textsuperscript{562} Law Commission \textit{Adoption and Its Alternatives: A Different Approach and a New Framework} (NZLC R65, 2000) at 3. This involved a comprehensive reappraisal of the law relating to adoption and looked beyond that discrete issue in terms of possible reforms by looking at alternative legal frameworks which would embrace permanency for children in the care of the State. The report languishes.\textsuperscript{563} Law Commission, above, at xv.
safeguard the welfare of the child.”^564 However, it “is evident the lack of a coherent and principled approach to the placement, protection and care of New Zealand children who birth families cannot or will not provide properly for them disadvantages these children.”^565 A contemporary manifestation of this is the debates about whether there should be mandatory reporting of alleged child abuse.^566

The specific topic canvassed by this thesis suffers from a dearth of information about how the State sees its role in respect of the children in its care, save for a discrete policy framework - the ‘Home for Life Policy’- that applies in respect of the supports to be provided to the caregivers of children who are permanently placed. New Zealand is not alone in this respect. Thomas, for example, notes that some countries have “family policies which are explicit and comprehensive, in that there are relatively clear over-arching goals which those policies are designed to achieve.”^567 Others accept family policy as a field and evaluate policies having regard to their impact on families.^568 Still others, and Thomas includes the United Kingdom and the United States here, have implicit and reluctant family policies. New Zealand is also such an example.^569 It is therefore sufficient to say that New Zealand’s history, and certainly its contemporary history, indicates an absence of articulated policy intent.

7.4 The CYPF Act in this context

It is important to acknowledge the specific unease that lies at the heart of the state’s responsibility for the children in its care. Inherent in the care and protection framework is the desire to protect children from abuse and to remedy the harm they have suffered through therapeutic intervention, yet there is, seemingly, a reluctance to commit sufficient resources

^564 Law Commission, above, n 565 at 2.
^565 Law Commission at 3.
^566 Green Paper for Vulnerable Children Every Child thrives, Belongs, Achieves (New Zealand Government, Wellington, 2011). (A Green Paper is a discussion document outlining the ideas that a government may have and which it wants to test with the public before a decision is made.)
^567 Thomas, above n 67, at 52.
^568 The Children’s Commissioner and the New Zealand Law Society in 2012 both made submissions (to the Review of the Family Court initiated by the government in 2011) for the enactment of a law analogous to the New Zealand Bill of Rights Act in respect of children. The intention behind this was to ensure that there was wider consideration given to the effect on children of laws passed in the same way as occurs with the New Zealand Bill of Rights Act. Should any enactment be repugnant to the New Zealand Bill of Rights Act the Attorney-General must issue a certificate saying so. The Law Society also proposed the establishment of an overarching Children’s statute that would require government agencies involved with children to coordinate their work to avoid silos being created.
^569 In another area, that of the legal framework that may apply to the any new post-permanency family, the 2011 Review of the Family Court posited a need for further consideration of the operation of guardianship in such instances. The subsequent Bill that emerged did not address the question.
to ensure such intervention is effective and sustained.\(^{570}\) This tension signifies one of the debates about the role of the State in assisting families of permanently placed children and the extent to which this is characterised in political/economic terms. In New Zealand it is necessary to recognise the impact of neo-liberal/new right policies that have been a feature of all governments since 1984, along with the imperative to reduce public spending.\(^{571}\) Similarly in England, Hendrick has referred to the Children Act 1989 as being about the “privatised family”, in contrast to the family envisaged by the Children Act 1948 which was more about a family within a democracy.\(^{572}\) This tension is manifested in the dichotomies that arise in the public perception when a case involving a child or his or her family gets publicised: a child is killed by a family member (or has suffered horrific abuse) and there is an outcry about the failure of social services to intervene to protect that child by having earlier removed it from the abusive parents.\(^{573}\) In contrast, intervention can occur on the basis of an allegation of sexual abuse based on a statement reported to a social worker (or educational or health professional). The child is removed from their parents and there is an outcry about the unwarranted intervention of the State in the lives of families.\(^{574}\) This is a tension that exists in the care and protection response of all jurisdictions.

Over the past 10 years CYFS has developed strategies in respect of the permanent placement of children in new families - first in 2006 and then in 2010 - to deliver supports to those children and their caregivers. These policies were not formulated following consultation with the wider community; there was no public debate or discourse about their content or their conceptual/philosophical underpinning.\(^{575}\) However, in 2011 the Government released the Green Paper on Vulnerable Children and subsequently received extensive feedback in

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\(^{570}\) Harding, above n 19, at 5; Smith, above n 523.


\(^{572}\) Hendrick, above n 78, at 288.

\(^{573}\) The New Zealand cases of James Whakaruru, the Aplin girls and Delicia Witika are examples of this. That of Maria Colwell in the 1970’s is an English example.

\(^{574}\) The Cleveland inquiry in the United Kingdom is an instance of this dynamic.

\(^{575}\) This policy is discussed further in Chapter 12. There was some limited consultation with the New Zealand Law Society in respect of the 2006 permanency policy. However, the same did not occur in respect of the ‘Home for Life’ policy. (This writer represented the Society in discussions with officials on discrete aspects of the support package which was part of the 2006 policy.)
response to their invitation to the public to comment on the matters addressed, including children’s out-of-home care.576

Pertinent in this respect is the inter-relationship between the agencies of government. The principal agencies are CYFS and MSD, being the responsible operational and policy arms. However, the role of other agencies, notably Treasury, Housing, Education and Health are also significant as their policies and practices have an impact on families and their well-being. Pryor notes the example of the health system in discussing a change in western societies towards a greater focus on the individual as opposed to the group.577 By doing so, that system ignores the fact that the ‘person’ (and one could substitute here the expression ‘permanently placed child’) “is embedded in a family grouping that is affected by, and affects, the health of the family member.”578 The need for these agencies to work collaboratively and seamlessly across departmental boundaries is essential. However, the ‘silo’ effect whereby budgets and boundaries are fiercely protected against interlopers, especially in times of fiscal constraint, remains an ever-present reality. This has been a perennial issue and one that appears almost insurmountable.579 An instance of this is disputes between caregivers and the Chief Executive over supports that may be required for a permanently placed child where the child requires teacher aide support at school.580 The Family Court has, on a limited number of occasions, been asked to determine issues of support for permanently placed children. I now turn to the limited line of authority that has developed in this regard.581

576 Above n 568. Whether the resulting Vulnerable Children Bill reflects those submissions is moot.
578 At 2.
579 However, see the discussion in chapter 13 as to the effect of the changes proposed by the Vulnerable Children Bill.
580 Tangible instances are difficult to locate. However, in cases of permanency of children it is the experience of this writer (in his practice as a family court barrister) that the Chief Executive continues to maintain the position where there are issues of health or education that arise the resolution of those concerns lies with the Ministries of Health and of Education. Of common occurrence is the situation of children who require the assistance of a teacher aide in the classroom or the playground. The number of hours required can be assessed and determined. This will often be more than what the Ministry of Education (and/or the school through its own resources) will or can provide. Recourse is had to the Chief Executive – often in reliance on a services order against the Chief Executive and which will specifically require that assistance to be provided. There is resistance.
7.5 Case law and policy

There have been a number of cases which have considered the role and duty of the State to permanently place children, including here not only those who have been abused but also children who may have significant disabilities and consequently are in need of care and protection. They must be placed because of the significance of their disability. The decision in Keogh v Director-General of Social Welfare is an example of the issues and of the response of the Family Court where there was a perception that the Chief Executive was motivated by fiscal considerations and a desire to see the costs involved in caring for the child assumed by other agencies. The judge noted the affidavit filed on behalf the Chief Executive and cited the following two paragraphs:

Chief Executive of Child Youth and Family Services, Whangarei FC Tauranga FAM-2008-088-637, 2 June 2010; Re MR FC Christchurch CYPF009/161/02, 28 April 2003; Menzies v Ministry of Social Development FC Upper Hutt FAM-2000-055-47, 24 June 2010; MI v Ministry of Social Development FC Huntly FAM-2010-024-76, 17 February 2011; PMB v JJB and Chief Executive [2012] NZFC 4689; T and D v Chief Executive FC Manukau FAM 2005-092-1270, 26 April 2007. See also Re J FC Masterton FAM 2000-035-90, 18 October 2006, a case involving supports orders. The discrete issue was whether the support order should be substituted by an order appointing the Chief Executive as an additional guardian to be the vehicle for providing support.

582 Keogh v Director-General of Social Welfare (1997) 15 FRNZ 626. See also the decision of Elias J in C M P v DGSW [1997] NZFLR 1 (HC) at pp 22-23, where the Court also commented on issues surrounding financial resourcing:

“The question of funding:
The submission made to me by counsel for the child is that the question of funding has been a major factor in these proceedings. That assessment is echoed by all counsel. It also comes through clearly in the contemporary documents. Ms Putland and Ms Donaldson both confirmed in their evidence that the question of funding for J was unable to be resolved because the legal status of Mr and Mrs C in relation to J was uncertain. They were not guardians under the Guardianship Act 1968, and with the interim custody order in favour of the Director-General lost their rights to custody of J. Similarly Ms Putland was of the view that 'the issue of legal status, funding and the FCG process are absolutely co-dependent on each other when it comes to making plans for this child's welfare'. Ms Stevens' evidence was that the present per annum cost of caring for J is about $27,000.

Mr McKinstry, counsel for IHC, confirmed the significance of funding for his organisation's involvement with J. As a service provider, IHC needs authority and funding. It is an approved Family Support Service under s 396 of the CYP Act. The concerns of IHC and the Department largely coincide. The options for funding are through Health or through Social Welfare. In the case of a child with severe physical disabilities, the bulk of the funding would normally be expected through Health, although if there were a shortfall it would prompt a care and protection issue which would be the responsibility of the Department of Social Welfare. What is important, in Mr McKinstry's submission, is that the authority of the Department under the CYP Act should be confirmed because it is only under that Act that the responsibilities for the services J needs can be provided. IHC has no children in its care who are the subjects of wardship and would not be prepared to accept appointment as agent of the Court if wardship order is made.”

583 The separated parents of an autistic child (who were supported by the Intellectually Handicapped Children’s Society) made an application for a declaration. The IHC could not provide the funding to the level required by the child in terms of placement; the family did not have the resources to cope with the demands presented by the child’s autism. The Chief Executive opposed the application. This raises the profound philosophical point about the distinction to be made about the provision of support (resources provided) between children with disabilities who are cared for by their parents and children who are the subject of state intervention under the CYPF Act. The distinction lies in the fact of coercive intervention by the State. That in this case, the application was
Para 12. That the issue in this instance is one of funding for the level of resources that Andrew has at the present time rather than care and protection concerns.

Para 13. That Andrew's behaviour is a result of his disability, not care and protection issues. Therefore funding for help, support and resource should be the responsibility of the RHA\textsuperscript{585} and IHC not the Children Young Persons and Their Families Service.

Those submissions were rejected by the Court. The judge found on the evidence that the child was in need of care and protection. The Court considered the duties of the Chief Executive as set out in section 7 of the Act and found that these duties overrode fiscal matters. The Court observed:\textsuperscript{586}

Before concluding this judgment I wish to make brief comment regarding the issue of funding and responsibilities of the departments and ministries in this regard. It seems to me in this case that the Director-General has allowed the issue of funding to cloud the very clear principles and duties outlined in this legislation. Where three family group conferences have been held and agreements reached, that seems to be a consistent call for immediate response by the Director-General. The overall responsibility for ensuring that the proper level of funding is provided for children with disabilities who are the subject of care and protection proceedings must be with the Director-General. Funding is just one aspect affecting the welfare and wellbeing of children. Long-term security, parental ability, and special needs of children are some of the other factors which exist in this case and in many others requiring state intervention. Accordingly, a decision of the Director-General that because the level of funding which is in existence for a child is satisfactory, no care and protection issues arise, would clearly exhibit limitations of the Director-General's responsibilities defined as duties under the CYPF Act.

Levels and sources of funding must become a secondary consideration in the timeframe and should be addressed once the legal framework has been established through the making of a declaration, the Family Group Conference process, and consultation with providers willing and able to meet the needs of the child at any particular time. The supervisory role of the Director-General can then facilitate, provide, and oversee the issues of resources, funding, and appropriate care throughout the period of

\textsuperscript{584} At 628.

\textsuperscript{585} RHA = Regional Health Authority.

\textsuperscript{586} At 635.
responsibility. I have made specific reference to this issue because of the submissions of
counsel which indicate a current view to the effect that where funding for children with
special needs is being met from sources outside the resources of the Children and
Young Persons Service, the Director-General is reluctant to either recognise care and
protection issues exist, or take pro-active steps to secure a declaration.

This case illustrates a clear abdication of responsibility on the part of the Director-
General of Social Welfare. Little evidence has been adduced which persuades me that
real efforts have been made to facilitate the provision of all resources needed by this
child. Instead there has been a clear indication that because of the disagreement over
the level and source of funding, fiscal arguments have taken precedence over the clear
responsibility to meet, in all respects, the care and protection needs of the child. Whilst
that responsibility is not being discharged, the child remains vulnerable and at risk with
the prospects of an unsettled future.

That the State does have a specific role to play was further clearly articulated in *Menzies v
Ministry of Social Development*.

587 Here the Court made important statements of principle as
to the duty of the Chief Executive in terms of the purpose of the Act, and the overlay of
UNCROC, to a permanently placed child where the Chief Executive no longer had custodial
status:

[9] His [the child’s] care and protection needs continue, and will continue until he is no
longer subject to the Children, Young Persons and Their Families Act. That is not
because his guardians lack for any skills or commitment. Rather, it is a continuing state
because T’s own family cannot care for him. Nor is it an adverse label, to be in need of
care and protection. Rather, it is recognition of the State’s responsibility to children
whose parents cannot whether permanently or temporarily fulfil that responsibility. This
special status is recognised in the UN Conventions of the Rights of the Child by article
20. That article provides (by para 1) as follows:

1. A child temporarily or permanently deprived of her family environment, or in
whose own best interests cannot be allowed to remain in that environment, shall
be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative
care for such a child.

587 Above n 581.
3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

[10] The special assistance which this child is entitled to is on-going foster care. That does not, however, enable the State to delegate completely the obligations which the State has to this child, arising from the deficits of his parents.

The current policy framework, as represented by ‘Home for Life’, fails to live up to that analysis. As will be discussed in Chapter Twelve, there continues to be a focus of minimising the role and responsibility of the State (where that can be achieved) and of placing the responsibility on the family. In part, this reflects the change in CYFS’ focus over the past decade or so whereby there is little long-term social work undertaken, with little or no oversight, of the children in state care. This has occurred alongside the removal of specialist units, such as the Auckland based Permanent Placement Unit, and with the consequent loss of expert and specialist knowledge being lost both about the Act and what is required for children. The Home for Life policy is CYFS’ response to its inability to resource working with families, on the one hand to see if children can be sustained in their birth families and, on the other, to reduce costs by outsourcing.588

The focus on looking at the new family and the obligation CYFS has to contribute to the needs of the child it has taken on occurred in the case of MI v Ministry of Social Development.589 The Court was faced with an argument by the applicants for a services order that reflected the theme articulated in Menzies. The Court qualified the central premise accepted in Menzies that there was an overarching duty on the part of the State. It considered the extent of any obligations owed to the children from their having been in care and then looked at the fact of being permanently placed in a new family, and with the new caregivers having to be prepared to bear some of the additional costs that are involved by their decision

588 I am grateful for the assistance of Dr Sarah Calvert, psychologist in developing this analysis. Once the permanent placement occurs and the caregivers obtain orders under COCA, the social work task of supporting the new family is contracted out to non-governmental organisations such as Barnardos or Open homes Foundation, being approved Child and Family Support Organisations, and with this being time limited to 3 years. See Bennett, above, n. 43.

589 Above n 581. (This author was counsel for the applicants in the case.)
to take the children into their home and provide permanency for them. The analysis suggested that where children have significant care and protection needs (including those arising from their care history) then a balancing exercise should be carried out by looking at those needs, considering what the Chief Executive has done to address them, and saying that at some point the new family must step up given that they have agreed to take permanent care of the children, with that being reflected in COCA orders. This is highlighted in the following extracts:

[21] I suggest the central issue here is to consider the extent to which the State has an on-going obligation to recognise all that has flowed from the previous care and protection concerns against the benefits to the children as not being perceived as being under the state’s care but having been handed to them the right as is enshrined under s 13(f)(iii) and (h).

[22] If that above proposition is correct, the consideration appears to be striking the right balance when considering the permanency proposal. On the one hand there must be I say a recognition of the environment from which the children have come from. There must also be a recognition that the Chief Executive in this case has provided significant support both financial and non-financial to assist the children to address and alleviate those care and protection concerns. The care and protection concerns in my view simply do not stop on the making of the permanency although things are much improved for the children [as] is clearly seen from the latest reporting.

[23] On the other side is the full notion as must be given to the children of the permanency proposal. They have a right enshrined at law to be out of the State’s care in all facets of that. The evidence I have is that they are well bonded with the caregivers, see themselves as part of the caregivers’ family and are an important and integral part of that nuclear and wider family structure. That is I suggest all that is countenanced as relevant to these circumstances in s 13 of the CYPF Act.

...
Having weighed the factors and the matters at issue, I am of the view that there is some need and it is appropriate in the children’s best interest for the Chief Executive to respond further with further financial assistance for the children. It does not escape me however (and it is not asked by the caregivers in this way) that that should not be forever…. I agree with part of the Chief Executive’s argument that some of these costs are costs which the caregivers should wear, given their decision to take permanency and be absorbed as part of their family.

Thus the Court accepted that there was a duty on the part of the Chief Executive to support the children and the new family having regard to the care and protection and care histories of the children. However, and as can be seen from paragraphs [21] and [29] above, with the children having been placed in a family setting, the duties and obligations needed to be shared by their caregivers. This was a joint responsibility given that the family had agreed to take the children into their home and this, in part, was sufficient for there to be that assumption of financial liability, for a limited period. The Court also found that as it was a good placement, in a “firm, sound and appropriate nuclear family” with some support from extended family, this was further reason to place limits on the support provided by the Chief Executive. The policy statements being made in this judgment reflect the underlying philosophy of the Act – the role of family and whānau being at its forefront, coupled with the moving of responsibility from the State to the family:

As already observed the caregivers here are not whānau, but have in a real sense come to be whānau for these children. The issue that the caregivers are not whānau is somewhat ancillary. I sense more of a moral obligation for whānau even extended whānau to step in to assist to alleviate care and protection concerns. Here the caregivers started off their involvement with the children as well meaning neighbours looking out for other human beings in their community. They saw a need and responded to it, so much so they were affirmed in their care of the children by the Chief Executive and are...

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591 With that family being one in which they could develop a sense of belonging, and with their sense of continuity and personal and cultural identities being sustained [as prescribed by s 13(f)(iii) of the CYPF Act] and with their no longer being in the care of the State as the placement with the applicants had given the children an opportunity to develop a significant psychological attachment with the applicant caregivers, [the s 13(h) injunction].
592 At [30].
593 The judgment also had regard to the fact that the nature and extent of the agreed supports was “already significant. It is far in excess of the home for life package.” See [28]. It would appear inappropriate to have found that to be a relevant factor to take into account to otherwise reduce or lessen the support that might have been ordered.
now seen by the children as parental figures. That is all that could be expected from the legislature in terms of those provisions as are relevant in s 13 of the CYPF Act.

7.6 The Fox Harding analysis

In considering the theoretical basis for the involvement of the State with children, it is necessary to remember there is neither certainty nor consensus as to the nature of the state’s role in the provision of care and that there are different perspectives that can be applied. Fox Harding has developed a four-value perspective that analyses the concepts underlying the policy question. There are aspects of these four perspectives inherent in the CYPF Act that govern its operation and reflect the overall policy paradigms that apply. The four perspectives will be discussed separately and then in the context of the Act’s framework.

7.6.1 Laissez-faire-fair (minimalism) and patriarchy

Here the state’s role “in child care should be a minimal one, while the privacy and sanctity of the parent-child relationship should be respected.” Underpinning the principle are the dual notions of mistrust of the State and of the dangers that potentially flow by the state’s exercise of power. The state should keep out of the lives of families unless there is some absolute imperative that necessitates intervention. A weaker and minimalistic state that intervenes only when there is simply no other option, means there are stronger families; stronger families lead to stronger individuals. Parents can be left to raise their children as they want, benefitting both the family as a whole and the children as individuals. The state has no business in the private lives of families, which should not be interfered with other than in instances of criminality. The interests of the child should be considered separate from that of his or her family only when clearly transparent minimum standards of parenting are not met. Unless that occurs, the family is to be left alone.

594 Harding, above n 19, at 8.
595 Patriarchy means the “power of adult males over women and children, particularly of the private sort’, that is in the family.” Fox Harding, above n 19, at 10.
596 Fox Harding, at 10.
597 Joseph Goldstein, Albert J. Solnit, Sonja Goldstein and Anna Freud The Best Interests of the Child: the Least detrimental Alternative (The Free Press, New York, 1996).[This is the trilogy edition encompassing Beyond the Best interests of the Child (1973), Before the Best Interests of the Child (1979) and In the Best interests of the Child (1986).]
Intervention by the State should occur only in the event of the family ceasing to function – if the child is abused or abandoned - and then the interests of the child are separated out from those of the family. When intervention occurs, the State being authoritarian, acts with speed in removing the child and placing her in a new home, recognising that decisions in respect of care and placement must be made within the child’s timeframe – and within their developmental tolerances. There is, by the time intervention is required, no ideal solution for the child. The only options left are those that are harmful. The obligation is, therefore, to find the least detrimental of these care options. This may be within a new family in which the child is able to feel secure and wanted and which holds the promise of a permanent placement.\(^{598}\)

Inherent in this model is an implied dichotomy between the private, encompassing the family and where women have a particular, but subsidiary, role, and the public domain in which any interactions between the wider society and the State is conducted by men. There is a tension between these two spheres\(^{599}\) that reflects the patriarchy paradigm. Within the family, the power is exercised by adults and, within that, by fathers and by men. This reflects firstly, the physical realities of relative size and strength; secondly, the economic realities whereby men have generally been in a far superior position in contrast to women; and, thirdly, the historical, social and political legacies that have inculcated the societies in which we live – the legal authority the common law granted to men and to fathers over children and over women and wives, and the slow progress both of voting emancipation for women and the presence of women in positions of power in business and political life. This patriarchal analysis – espousing the dominance of men over women and children in society and in families - is less prevalent as it is “less overt and support for it is less blatant” in modern society.\(^{600}\) In its contemporary form it reflects “relatively unfettered parental control which is desirable; the State cannot do the parents’ job for them in any effective way.”\(^ {601}\) However, Fox Harding argues that this is but a matter of degree and that patriarchy and minimalism continue to support and reinforce the other in modern times.

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\(^{598}\) At xv.

\(^{599}\) Fox Harding, above n 19, at 10.

\(^{600}\) At 13.

\(^{601}\) At 12.
7.6.2 State paternalism and child protection

This protective model seeks to nurture the abused child through extensive state intervention. It is the model that best fits the situation of children in care and who are to be permanently placed in new families. The model was particularly pronounced in the 1970s and early 1980s. It argues that child welfare should be, and must be, an absolute social priority, and can be characterised as.\(^{602}\)

… heavy-handed paternalism … [and] characteristic of many of the best-known writers on child mistreatment …. Anyone failing to accept this whole-heartedly [that it is an absolute priority] may then be justly criticized.

This is a liberal perspective on the role of the State and is exemplified by the belief that in the end: \(^{603}\)

… the State cannot opt out [there is]… a collective interest in the moral and physical well-being of future citizens, in the quality of social reproduction, as a necessary condition for the survival of this type of society.”

Parenthood in this model is taken on trust. If that trust is abused, or in some way not met, then the State intervenes for the benefit of children. Where those who owe a duty to children fail in that duty, “the beneficiaries may call them to account before a court with a view to their appointment being terminated.”\(^{604}\) Fox Harding summarises this as “being a parent \textit{per se} confers no special rights.”\(^{605}\) Rights associated with parenthood, are dependent on the corresponding exercise of duties – toward the child.\(^{606}\) The parent in this model must care properly for the child and, if not, the State will step in. The state is neutral, a “‘good parent’, acting wisely to protect the weak, and blind to divisions of class, ethnicity and gender”, and not “defending particular interests and systems.”\(^{607}\)

When parental care is inadequate the child will be found a new permanent home.\(^{608}\) The focus is on the child as the “rights and liberties of parents are given a low priority.”\(^{609}\)

\(^{603}\) Dingwall, Eekelaar and Murray at 220.
\(^{604}\) Dingwall, Eekelaar and Murray at 220.
\(^{605}\) Fox Harding, above n 19, at 51.
\(^{606}\) Dingwall, Eekelaar, and Murray, above n 605; Fox Harding, above.
\(^{607}\) Fox Harding, above at 42
\(^{608}\) Fox-Harding does not qualify ‘inadequate’ by, for example, ‘grossly’ or ‘significantly.’
agents of the State – social workers, health and education professionals, judges and lawyers appointed to represent the child\textsuperscript{610} - know what is best and are quite able to make appropriate decisions about what is in the best interests and welfare of the child.\textsuperscript{611} The child, in this model, is dependant and vulnerable and any views that the child may express are a secondary consideration if they are in conflict with the perception of best interests being advanced by decision-makers. The rights of the child are thus embraced within the concept of the right to be cared for by an adult, as opposed to any independent substantive right to self-determination.

This is a class-ridden perspective – with middle-class decision-makers on the one hand, and working class parents on the receiving end. It is inherently a ‘rescue’ model where the State has a duty to intervene where there is inadequate care (or the suspicion of it) and the “capacity to provide something better for the child.”\textsuperscript{612} The provision of long-term/permanent substitute care is “positively valued.”\textsuperscript{613} Children are found new safe homes through adoption/secure foster care. This beneficent view of children being in the care of the State is accompanied by the parallel perspective that there are no negative aspects to state intervention and that the judgement of those making decisions for the child, and their analysis of the child’s welfare and best interests, might not in any way be wrong.

This model, as with the laissez-faire one, proceeds on the basis that adults know best. The difference is that the adult(s) in question are agents of the State (social workers) and related health and educational professionals (and lawyers representing children) as opposed to the parents. A further similarity, at least at the superficial level, is an emphasis on the psychological as opposed to the biological parent. However, there is one significant

\textsuperscript{609} Fox Harding, above n 19 at 40.
\textsuperscript{610} Lawyers appointed to represent children are not decision-makers in any formal sense. However, their influence is profound and should not be under-estimated. Based on the author’s experience of over 20 years acting for children.
\textsuperscript{612} Fox Harding, above n 19, at 41.
\textsuperscript{613} At 41.
difference: the threshold for intervention under the paternalism/child protection model is much lower. Supporters of the model would maintain the placement of the child with the birth parents even if they were not good parents if there was an attachment between the parent and child and it was the least detrimental alternative.\(^\text{614}\)

The rationale advanced for this model and its emphasis on the welfare of the child, is that, first, there is the moral duty to relieve suffering, noting that children are inherently vulnerable and unable to protect themselves.\(^\text{615}\) Second, children, unlike adults, do not enter into contracts freely: children do not make the decision to be conceived, born or to select their parents.\(^\text{616}\) Third, children are the future and the State has a proper interest in ensuring that appropriate socialisation occurs. The abused child is more likely to grow into an abusing and neglecting parent than a child who does not have that history. Accordingly, the State has a duty to protect abused children because a social investment is warranted by addressing the situation for children. This can only be done by the State, being the only body able to act on behalf of society as a whole.\(^\text{617}\) The caveat with state paternalism is that, if it is not appropriately resourced, it is likely to result in poor outcomes – poor planning and related decision-making, inadequate alternative care and inadequate later intervention to address the dual legacies and necessary for the child’s long term well-being. There is need for a sufficiently skilled and resourced agency. In its absence, the intervention of the State is likely to make an unsatisfactory situation worse.\(^\text{618}\)

7.6.3 The modern defence of the birth family and parents’ rights

This involves the proposition that “birth and biological families are important for children and parents, and should be maintained where possible.”\(^\text{619}\) A corollary is that when children must be separated from families, links between them should be maintained. The role of the State is to support families and be neither laissez-faire nor paternalist. The model recognises that class, poverty and deprivation assist in explaining why intervention is necessary in families. Macro-issues that individuals and individual families have no control over are

\(^{614}\) At 42, noting for example, Goldstein above n 597.  
\(^{615}\) At 50.  
\(^{616}\) Dingwall, Eekelaar and Murray The Protection of Children above n 218.  
\(^{617}\) At 192.  
\(^{618}\) At 192.  
\(^{619}\) Fox Harding, above n 19, at 70.
identified as being causal factors. The perspective emphasises the importance of keeping children and parents together.

The model differs significantly from the others on the role of the State once there is an identified need for intervention. The task is to provide sufficient support for families so that children do not need substitute families or substitute care. The perspective does not look to the minimalist state but to an active and supporting one, helping families to stay together. Should children come into care, then the obligation is to support those families and those children so that the children can be returned home, or have a permanent foster home but maintain an active relationship with the birth parents. It places far less emphasis on the importance of the child having a new and permanent home in which he or she forms significant psychological bonds to the new caregiver and to the exclusion of the psychological relationship with the birth parents.

7.6.4 Children’s rights and child liberation

The essence in the fourth of Fox Harding’s models is on the importance of the child’s views and wishes. The child is regarded as having a separate existence with autonomy and freedom. It questions the proposition that children can be controlled by the State or by adults, and does not emphasise the vulnerability of children, rather focusing on the expression by the child of feelings and views and of the child’s rights and freedoms. In the context of child protection, however, this model is perhaps the least relevant to the discussion set out in this thesis. This is because inherent in the very existence of child protection legislation is the notion of the vulnerable child who must be protected from abuse and neglect. This is the very antithesis of the rights and liberation model – at least at its zenith. There is therefore, at least in part, a degree of commonality with the laissez-faire model, but the latter nonetheless still provides a role for the State in protecting children, whereas in the more extreme manifestations of this model that would not occur - at least in terms of providing for their special needs (as children) other than as was prescribed by existing civil and criminal law.

However, Fox Harding observes that the proponents of this paradigm do not take the arguments to its logical conclusion. The argument is that children should be free of adult control/authority and have greater rights of self-determination, and at the extreme end, the

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620 At 109.
621 At 111.
same rights and freedoms as adults. They should not have limitations placed on them simply
because they are children. “Abolition of childhood as generally understood would thus be a
liberation.”

A more moderate version of this model would argue that children should have a more
independent say in what happens to them and the State should provide for this by amending
child care policies and laws accordingly. Children need to be involved and participate in
decisions that concern them and should have the right to at least partially define the responses
to those decisions. For present purposes, there is discordance with the notion of children
having [virtually] the same rights and freedoms as adults given what is known about children
by way of developmental psychology and, of course, the overall care and protection context.

7.7 The CYPF Act and the Fox Harding classifications

The care and protection system in New Zealand embodies variations of each of these four
perspectives, with the primary emphasis involving a combination of the second and third of
the models – state paternalism and child protection and the defence of birth family and
parents’ rights. This part of the chapter discusses the models in the context of the Act.

7.7.1 Laissez-faire and patriarchy

This model places its emphasis on a minimalist role for the State whilst simultaneously
emphasising the value of the parent-child relationship, and its preservation, unless there has
been a profound betrayal of the child by that parent. Two brief examples will suffice here,
involving the minimum intervention principle found in s 13(b)(ii) of the Act and the discrete
consequences that flow from that principle illustrating both laissez-faire and patriarchy
phenomena (though neither necessarily incorporates the other).

Section 13(b)(ii) needs to be seen in a dual context. Firstly, there was, and still remains, the
vision that it would be culturally relevant for Māori. This is the need for the whānau and

622 At 111.
623 At 112.
624 Fox Harding, above n 19.
625 Connolly, above n 571; J Rangihau, above n 18. See also the discussion in Chapter Eight. This looks
specifically at issues for Māori.
then hapū and iwi to take responsibility for their tamariki and mokopuna. The state had/has too much power in respect of families and children and because of this the ability of families to care for their children is/was undermined. During the genesis of the Act, the draft Bill was seen by many Māori to have an undue focus on the paramount interest of the child as opposed to whānau rights; it was therefore re-drafted and in its original form when passed, reflected the primacy of whānau decision-making. The Act was later amended following concern that s 6, the paramountcy principle, did not sufficiently place children and their welfare at the forefront of concern. Durie, nonetheless, refers to its acknowledging of customary values and to achieving a balance between individual and group rights, with there being “equilibrium between an exclusive focus on the child and a consideration of the child’s needs in association with whānau”. Tapp, however, observes that:

… despite the clear recommendation of the Mason report to reinstate the paramountcy principle, the new provision again attempted to combine an emphasis on family responsibility with a focus on the welfare and best interest of the child.

Connelly was quite explicit in her analysis of the family focus of the Act:

Central to the CYPF Act’s vision, however, continues to be an inherent validation of the whānau/family as primary caregivers for their own children and young people. Family responsibility is reinforced, welfare agencies having a secondary role of enable in terms of facilitating this family responsibility. Hence, in a move away from the traditional paternalistic system of welfare in which the child is rescued by the bureaucracy, the family is seen as the carer/protector and is supported to undertake this role.

Secondly, s 13(b)(ii) embraced the then (and still) prevailing new-right political philosophies that promoted a diminished role for the State and the reduction of expenditure across the State sector. This inexorably led to a shift of emphasis from the State to the family and to the community. There was, therefore, a serendipitous meeting between these two otherwise

626 Children and grandchildren.
627 Mason, Kirby and Wray, above n 614.
628 Mason Durie Launching Maori Futures (Huia Publishing, Wellington, 2003) at 132. See also Cockburn, above n 614, at 19.
630 Connelly, above n 571, at 90.
disparate themes.\textsuperscript{631} The aim of the Act, in respect of care and protection matters\textsuperscript{632} was therefore to place primary responsibility for children who might be at risk, with the family unit being perceived as the social group best equipped to support and assist children and their families.\textsuperscript{633} Families were to resolve issues of concern for children unless the nature and extent of these necessitated intervention. The emphasis the Act gives to the family and to its role in the decision making led Connolly, for example, to caution that by doing so the Act:\textsuperscript{634}

\[\ldots\text{could be seen as undermining the positive gains made in recent years by women in the area of family law. This, together with the additional caregiving responsibilities for women in such arrangements, raises many issues for women.}\]

Thus the patriarchy dynamic may be present when decision making occurs within families, with the possibility that decisions will be assumed by the males of the family.\textsuperscript{635}

The tragedies exemplified by the deaths of James Whakaruru, and Delicia Witika, and the ensuing public response to those, are redolent of this aspect of the model, with criticism of responsible welfare agencies coming from “[U]topian libertarians whose ideals break on the brute physical reality of children’s dependence on adults.”\textsuperscript{636} The rights of the child in this model are represented by the right to be protected from abuse and neglect,\textsuperscript{637} which of course is a right that some parents clearly cannot provide to their children, and in that event, must have that right removed from them by the State.

One dynamic to be noted here is that the support the State may offer, while often couched in the rhetoric of family support, has a reality that is, in fact, contrary to what is publicly asserted. Hence the State whilst talking of providing supports to children and families looks to the family/community to assume the burden, and thus reflects a laisser-faire paradigm. What is being supported is family autonomy and the need for the family of the now

\textsuperscript{631} At 90, noting that this connection was “paradoxically” one reflecting a community social work approach “supporting a return of power to the people” (and reflecting in this respect Māori concerns) and also fitting “the right wing monetarist approach with its emphasis on anti-protectionism and individual freedom”. The shift to family care that was promoted by the Act was also a far cheaper option than institutional or foster care.

\textsuperscript{632} Noting that the Act also deals with child and youth offending and in respect of this looks to accountability for that offending, albeit in the first instance through a familial as opposed to a prosecutorial response.

\textsuperscript{633} Al-Alawi, above n 511; Connolly, above n 571; James, above n 242.

\textsuperscript{634} Connolly, above n 571 at 99.

\textsuperscript{635} Fox Harding, above n 19.

\textsuperscript{636} Dingwall, Eekelaar and Murray, above n 218, at 220.

\textsuperscript{637} Michael Freeman \textit{The Rights and Wrongs of Children} (Frances Pinter, London, 1983) at 43, cited by Fox Harding, above n 19.
permanently placed child to assume responsibility in most, if not all, respects for the child irrespective of the issues the child may still have from its experience prior to being permanently placed. I argue that this is a dynamic that applies to the application of the CYPF permanency policy.

7.7.2 State paternalism and child protection

This model favouring state intervention in the lives of children and families is clearly reflected in the Act. The grounds of intervention set out in s 14 are broad in their ambit and the threshold level at which intervention can occur, being to the civil and not the criminal standard, represents a distinct paternalistic and protective approach. Children are to be protected from abuse and removed from abusive families: neither preservation of the family nor seeing children as members of a family unit that could or should be preserved is a focus of the Act. Section 6, the paramountcy provision, reflects state paternalism and the notion that professionals, social workers and judges being middle-class decision-makers, know what is best according to their belief systems. I am concerned with the subsequent response of the State once intervention has occurred. The Act itself gives little guidance. Section 13, for example, refers to children who cannot be returned home and asserts that these children have the right to be brought up within a kin placement and where that is not possible, then the opportunity is to be given to the child to develop a significant psychological relationship with the person with whom the child is placed.

A further question that arises is about the standard of care that a child who is in the care of the State should receive. There is authority for the proposition that:

It is a fundamental principle that state intervention is not justified by the prospect of improving a child's care but by inadequate care which, having regard to the diversity of

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638 Fox Harding, above n 19, at 94.
639 In this respect, the Act resembled its immediate predecessor the 1974 Children and Young Persons Act, which had grounds for intervention that were essentially the same as under the Act. (Both the 1974 Act and its predecessor, the Child Welfare Act 1925, were manifestations of the State paternalism model, providing a basis for intervention where children were the subject of abuse and neglect.)
640 Pallin v DSW [1983] 2 NZLR 266.
641 Section 13(g). The placement is to be with a person who is a member of the same “hapū, or iwi (with preference being given to hapū members), of if that is not possible, who has the same tribal, racial, ethnic, or cultural background of the child....”
642 Section 13(h). As an aside, with a kin placement, it matters not that the person with who the child is to be placed may be a stranger to the child. The Act seemingly does not require the child to be given the opportunity to develop a psychological attachment as is the case with a non-kin placement.
643 E v Department of Social Welfare (1989) 5 FRNZ 322, citing the headnote.
our New Zealand culture and its broad range of parenting approaches and abilities, is clearly unacceptable. The principle imports a consideration of minimum community standards of parental competence such that the State should not intervene unless the parental care has been proven to be unacceptably incompetent.

Intervention can only be justified if that threshold is met. Once a child has been permanently placed, the principle of minimum does not (and cannot) import the notion that the standard of parenting expected of the Chief Executive is only to provide to those children who are who are in care, a level of parenting that is just above that minimum standard and not beyond.644

Whilst there is a general sense of what the problem is – of abused and damaged children – and that this should not occur, nonetheless, there is little precise agreement about what the end result should be – as to the type of adult or social order that is required to provide the kind of upbringing for children that is seen as desirable.645 The choice of criteria is inherently value-laden; all too often there is no consensus about what values should inform this choice.646 Further, it is “exceedingly difficult” to predict outcomes in respect of policies concerning children.647

7.7.3 The modern defence of the birth family and parents’ rights

This model looks to sustain the relationship between children and their parents. It is a significant driver within the Act. This is illustrated by the precise emphasis the Act has on family and kinship648 with family decision-making, by way of the family group conference, being at the heart of the statute. The Act firstly refers to children being members of families.

644 It is certainly accepted that intervention cannot be justified because a child who is not otherwise at risk in a care and protection sense might be perceived to be better off in the care of someone other than its parents. See James, above n 242, at [6.558]. The text cites the unreported decision in Chief Executive of Child Youth and Family Services v M FC Dunedin FAM 2005-012-123, 25 July 2005 at [31] where the judge stated: “… parental idiosyncrasy and inabilities are permissible subject to the need to provide a child with care and protection.” The CYPF Act cannot be used for “social engineering” or for social mobility – although that may be a by-product of the intervention that occurs. – thus the fact that a child may make better progress when not in the care of his parent is not enough to establish that a ground for holding the child to be in need of care and protection exists or that a child should not be brought up by its parents if they are able to parent the child at a minimal level only.645

645 Fox Harding, above n 19, at 7.


647 Mnookin at 16.

648 Cockburn, above n 614.
This gave a “cultural and symbolic relevance never previously enacted into New Zealand legislation.” The Long Title to the Act in its opening paragraph states that it is an Act:

To advance the well-being of families and the well-being of children and young persons as members of families, whānau, hapū, iwi and family groups.

The Short Title to the Act – The Children, Young Persons and Their Families Act - is to the same effect and can be contrasted with the short title to the Act’s two predecessors – the Child Welfare Act 1925 and the Children and Young Persons Act 1974, both of which are silent in respect of families. The Act has a focus on the stability of the family group and of advancing the well-being of those groups. This focus was so pronounced, particularly in terms of section 6 as it was first enacted, that it was perceived as placing an undue emphasis on the family.

Case law has also recognised that dynamic: in the Court, whilst describing the s 13 principles as being but guides, opined that they were nonetheless unusually detailed and explicit. They were condensed down to three essential propositions: firstly, the well-being of the child is entwined with that of his family; secondly, the child’s well-being is to be promoted by or through the family to the fullest extent possible; and, thirdly, the child is to be severed from the family to the least extent necessary, and only as a last resort. A number of cases acknowledge these principles, with one judge interpreting s 13(b) as meaning that there

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649 Cockburn.
650 Emphasis added.
651 See for example the objects provision s 4 and specifically paragraphs (a) – (c) inclusive, the general principles contained in s 5 and specifically paragraphs (a) – (c), and the care and protection principles set out in s 13, notably paragraphs (b) – (f) inclusive. These provisions all have a focus on the interconnectedness between the child and his or her family and family group. The provisions are set out in Appendix 1.
652 Section 6 is the welfare and best interests’ provision. As originally enacted it provided that where there was a conflict of principles or interests, the welfare of the child “shall be the deciding factor.” It was amended to make it clear that the welfare and best interests of the child were the first and paramount consideration, having regard to the principles set out in sections 5 and 13.
653 D-G SW v M (1993) 11 FRNZ 231. The Lexis Nexis text notes that the dictum has been cited with approval in a number of subsequent cases: Re C FC Nelson CYPF 042/400-2/92, 20 October 1995; Re B FC Palmerston North CYPF 054/41/95 and 6/94, 7 April 1999; I v Chief Executive. CYFS FC Hamilton CYPF 176/184/96, 115/97, 14 August 2003; Re P Children [2004] NZFLR 97. (James, above, n 242.)
654 Apart from s 13(a) which is mandatory: “…children … must be protected from harm, their rights upheld, and their welfare promoted”, the remaining paragraphs are expressed in less direct terms: thus s 13(c) provides that it is “desirable that children live in association with family or whanau; s 13(d) – when a child is considered to be in need of care and protection, “wherever practicable the necessary assistance and support should be provided”, and in s 13(f) regarding a child who has been removed from family, the placement that then occurs should be “wherever practicable” be in accordance with the provisions of the paragraph.
should be “a conscious consideration by Courts and CYFS to ensure that intervention is not heavy-handed, that it is considered, and that it is tempered.” 655

Further, in respect of parental rights, the Act has as a primary focus the need for the State to support families.656 Thus intervention, in addition to being the minimum necessary, should have as its goal the return of the child to her family. The state is seen as potentially benign if it commits resources to sustaining the child in the family or in returning the child.657 A feature of this model that is clearly present in law and policy is the imperative that children must have an on-going relationship with their birth parents. For example, the Chief Executive has an unequivocal duty under s 7(2)(c)(iv) not to alienate children from their families and whānau: and certain of the objects and principles set out in ss 4 and 5 endorse this. There is a fundamental tension between this imperative and that of ensuring the need for stability for the permanently placed child. This occurs in the principle embracing continued familial/whānau contact conflicts with the need for stability of that permanent placement.

7.8 United Nations Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (‘UNCROC’) has been an important driver in the development of social policy and law. The Convention is acknowledged in case law as being relevant to informing decisions that are made about children. This has resulted in there being a need to show respect to children in New Zealand and to ensure the rights that UNCROC brings to children are honoured by the State and its agencies. A further relevant dynamic is that of the children themselves and the extent to which, if at all, their voices can, or should, be heard in permanency cases given the nature of these cases. I accept, as a matter of theory and of practice, that the permanently placed child will have views on what is happening to them and that they should have opportunities to express those views and have them taken into account. The impetus brought to this discussion by UNCROC cannot be over-emphasised in this respect.

UNCROC was adopted by the United Nations in 1989 and ratified by New Zealand in March 1993. It does not override domestic law. It does, however, create obligations under

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655 See E v G [2008] NZFLR 337, at [45].
656 See for example, ss 4(b) and (c), 5(b) and (c), 13(b), and (d) of the Act. See also Stephen Coyle “Permanency Policy: Children in Care” [2008] NZFLJ 37 at 45-49, who argues that every endeavour should be made to support parents in the first 6 months of intervention and removal to see if it is possible for the child to be returned.
657 Fox Harding, above n 19.
international law and requires domestic law to be interpreted so as to accord with it.\textsuperscript{658} This is occurring now in family law jurisprudence as UNCROC is cited in the Family Court on a day-to-day basis, in submissions by counsel and in judges’ decisions concerning children.\textsuperscript{659} Its provisions have been reflected explicitly in New Zealand law with ss 5 and 13 of the Act\textsuperscript{660} being compared with the Convention and the observations made that these sections were:\textsuperscript{661}

\ldots framed in light of the \ldots Convention \ldots and are therefore to be interpreted, where possible, in a way that brings their provisions into compatibility with the Convention’s scheme and purposes

In \textit{DGSW v G} \textsuperscript{662} the Court held that Articles 3.1, 7.1, 9.1, 9.3 and 18.2 of the Convention were consistent with the principles in s 13 and that those principles, when read in conjunction with UNCROC, created a presumption that a parent will be responsible for the child’s care and upbringing. However, if a child needed to be removed from a parent, the child must be given the opportunity of maintaining a relationship with his or her family group. That decision and the Court’s analysis have been accepted in subsequent cases.\textsuperscript{663}

\textbf{7.8.1 The UNCROC Articles}

Specific provisions of UNCROC relate to the law as it addresses issues of belonging, identity and support for children and for the families of children in state care. The principles recognise that children sometimes have to be removed from families and, when this occurs, the State has specific obligations to them and to their families, and to the voice of the child

\textsuperscript{659} \textit{C v R} HC Rotorua CIV 2006-470-27, 7 August 2006. This is also typified by my own experience as a family law practitioner and by the case references noted in this thesis.
\textsuperscript{660} Section 5 of the CYPF Act contains statements of general principle insofar as the rights of children to have families make decisions for them, of looking to the family as the first and primary palace of support for children and to be heard, and s 13, details more specific statements of principle relating to care and protection proceedings. Section 13 again looks to the family of the child as the first port of call when safety issues arise for children and, in the end, recognises the need for state intervention when families cannot keep children safe. Similarly the wording of ss 4 and 5 of COCA are in part of similar effect.
\textsuperscript{661} Inglis, above n 183, at 644.
\textsuperscript{662} \textit{DGSW v G} (1995) 14 FRNZ 23.
\textsuperscript{663} For examples of the many cases where UNCROC has been cited see \textit{Re the S Children (no 3)} (1994) 12 FRNZ 430; \textit{Re the W Children} (1994) 12 FRNZ 548; \textit{P v K}, above n 654; \textit{L v A} (2003) 23 FRNZ 583 and more recently the first of the WF sequence of cases, \textit{WAF v Ministry of Social Development} FAM 2007-004-584, 18 May 2010; \textit{Chief Executive of the Ministry of Social Development v APR} [2013] NZFC 6905.
being heard. That new family into which the child has been placed must be supported in meeting its duties and obligations to the child.

Article 3 provides that the welfare of the child is the first consideration. Article 5 notes the obligation of states parties to respect and recognise the rights and duties of parents, and for parents to provide for children cognisant with the evolving capacities of the child, and for parents to give appropriate guidance and direction in the exercise by the child of rights conferred by the Convention. Article 7 contains the duty on states parties to ensure that children are registered immediately after birth, that they have the right to a name, and, importantly in this context, as far as possible, have the right to know and to be cared for by their parents. Article 8 is significant as it provides recognition of the child being able to maintain relationships with family with there being a need to preserve both ‘identity’ and ‘family relations’. Article 8 can be used in permanency cases to sustain arguments either for keeping the child in the birth family or to maintain contact with the child should the child be permanently placed. Article 9.1 recognises that children sometimes have to be removed from families by the State, but makes it clear that this must be in accordance with the law and, where necessary, be in the best interests of the child.

Explicitly in respect of the child’s ‘voice’ and their right to participate, Articles 9.1, 9.2, 12 and 13, are important. Article 9.1 makes it clear that children must be heard when there are care and protection proceedings taken by the State, and they are removed and placed in new families. Article 9.2 suggests that children who are the subject of such proceedings have a right to be heard – if they can be seen as “interested parties” – in addition to their parents. The sub-paragraph provides that all interested parties in such proceedings shall be given an opportunity to participate in the proceedings and make their views known. Article 12 details the right of children to express their opinions freely and to have those opinions considered in decisions which affect them, particularly in any judicial and administrative processes, whilst having due regard to their age and maturity. It is described as a critical provision:664

... because it marks and demands a shift from a paternalistic approach to one where children are seen as stakeholders in decisions with a right to have some input rather than merely being the object of concern or the subject of the decision.

Article 13 recognises the right of children to receive and impart information. This too is significant in enabling rights – as the ability to have access to information provides the vehicle for the child to understand what is happening and why, and to then express an opinion on that – in anticipation of that view being heard and taken into account.

Article 19.1 places an obligation on states Parties to protect children from abuse. Article 19.2 places a duty on those parties to take protective measures, including the establishment of social programmes to provide necessary supports for the child and those providing care.

Article 20 is a highly significant provision. It acknowledges that children may be permanently removed from their parents and provides the underpinning of the duty and responsibility the State has towards the permanently placed child. It emphasises that when a child is removed, special consideration shall be paid to the desirability of continuity in upbringing, and to the child’s ethnic and cultural background, and where removal has occurred, children are entitled to special protection and assistance being provided by the State. This informs the precept of the social contract that exists between the State and the caregivers of the permanently placed child.

These Articles, when read together and in accordance with the overall tenor of the Convention, make it clear that children have rights to maintain knowledge of their families if they cannot live with those families, to be heard on matters that concern them in the exercise of statutory powers under the Act and under COCA and, in the event of being removed from their families, to be placed within a safe and lasting environment. These are all obligations the contracting state owes to the child.

664A See also Article 39 and the duty of the State to take all appropriate measures to ensure the recovery of abused children.
665 In Chief Executive of the Ministry of Social Development v APR, above n 663, the court endorsed my submission as lawyer for the children that it give an indication of the Court’s expectation of the Chief Executive implementing the necessary supports the children required. They were in care and their intended permanent placement had collapsed. The Court referred to the duties under s 13(d) of the CYPF act to provide assistance and as the New Zealand government had adopted and ratified UNCROC it had to meet the obligations arising under the Convention, with articles 19.2 and 20.1 being pertinent.
7.9 Why the views of children are relevant in permanency cases

It might be thought that where CYFS removes a child from their parents that the child’s views are redundant because they have been the subject of such abuse/neglect that the process followed pursues an inexorable path towards the inevitable outcome – a new home with a new family. What place can views expressed by a child have in this situation? Congruent with this is the proposition that decision-makers who are acting to protect the child, and who have determined that a new home is required, know what is best for the child. From that perspective, the welfare and best interests of the child, as represented by that process and that decision, will take priority over any views that a child may have about what has happened or will happen to them. However, this line of argument represents a profound misunderstanding of the law and, more particularly, of the ability of most children to capably participate in the process by expressing their views. This does not mean that the child is a decision-maker or has the right to determine the outcome of litigation. It means being listened to and having any views expressed taken seriously and heard with respect.

This is particularly cogent when decisions are made for children in care as opposed to how decisions are made for children who live in families in the absence of state intervention.\(^666\) Decisions for children living at home are made by the parents themselves for their children with there being daily interaction between the children and the decision maker.\(^667\). This is not so for the child in care: there may be a number of adults involved in the decision and not all will have met the child. In addition to caregivers and parents, there may be lawyers, social workers, psychologists, counsellors and judges. These children need to be heard because: \(^668\)

\[\ldots\text{ it gives some sense of being active agents in relation to their care as opposed to being powerless victims at the whims of adults; there is evidence that when children have some choice about the placement, the placement tends to be more stable; and children learn by example and by practice, and being able to participate in decision-making with support and guidance is a vital part of the socialisation of children to prepare them for future independence and autonomous decision-making.}\]

\(666\) Cashmore, above n 667.

\(667\) In saying this I am not at all overlooking the fact that children are active participants in families, contribute to decision-making that occurs and, at times, make the decisions themselves. Of importance in the permanency context are those ostensibly permanently placed children who ‘vote with their feet’ and return to their parents.

\(668\) Cashmore above. See also Moira Rayner “Why Children’s Participation in Decision-Making is Important” (paper presented to Lexis Nexis Child Law Conference, Auckland, 20 March 2003).
Further, when children are both heard and taken seriously, organisations make better decisions.669 The traditional approach – ‘let’s leave it to the adults to determine what was in the welfare and best interests of the child’ – has not worked.670 That principle, which is at the heart of modern family law, has been interpreted in a way that has reflected adult assumptions as to what it means for the child.671 This begs the question whether the decision taken is one which can really represent the welfare and best interests of the child, if the views of the child are not heard.672 The concern expressed by social workers that if children were asked what they wanted, it would be “to get what I want”, has been noted by commentators as incorrect since children consistently put at the top of their wish lists “to be listened to”673 (or that they want to simply go home). Rayner highlights this in looking back over her career as a lawyer for children:674

> Over the years I had come to understand that unless children were seen as clients in their relationships with their legal advocates, and as full participants … serious mistakes are very likely to be made.

Cashmore refers to a consistent theme across studies from Britain, North America, Australia and New Zealand that most children think they have limited opportunity to be involved in the way important decisions are made, such as where they live, and when and how often they see their parents.675 It is often found that those working with children take the view that children need to be protected from what is taking place. It is only where the views of the child coincide with those of professionals that there is a powerful alliance created for implementing a care plan for the child in care. Where this does not occur, the child is excluded from

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669 Judy Cashmore “Children’s participation in family law decision-making: Theoretical approaches to understanding children’s views” (2011) 33 Children and Youth Services Review 515-520 at 515.
670 Rayner, above n 668.
672 Nigel Thomas Social Work with Young People in Care – Looking after children in theory and practice (Palgrave Macmillan, Basingstoke, 2005) observes that there are 4 issues with the notion that best interests paradigm is objective: (a) its application to individual cases can be difficult, (b) is there a conflict between short and long-term interests and on what basis [whose values operate?] is the decision made about which goes first, (c) different cultures have different assumptions about what constitutes best interests, and (d) who in fact is the decision maker as to what is or is not in the best interests of any particular child – family, experts, adults, the child?
674 Rayner, above at 2.
675 Cashmore, above n 667, at 839.
participation. One New Zealand study found that at least a quarter of the children did not understand why they were in care. Also, the changes wrought by COCA, on its introduction in 2005, resulted in a much clearer emphasis being given to the need to hear the voices of children on matters that concern them. This trend in the private law arena is now influencing the public law domain, given the close connection between COCA and the Act.

7.10 Children’s participation – being heard – the CYPF Act and COCA

The Act has specific provisions that are intended to provide for children’s participation. Section 5(d) provides that consideration must be given to the wishes to the child having regard to the child’s age, maturity and culture. However, this is not as explicit as the complementary provisions in COCA. The Act is an older statute and was enacted at a time when formulation of the rights of children to participate was less advanced than by the time of COCA. Nonetheless, certain of these provisions have been described as allowing for the direct participation of children. COCA redefined the tasks of those appointed to represent children, and those who make decisions about children, regarding the ascertainment of their views. COCA is relevant as in order to secure permanency, caregivers will obtain orders

677 Smith, Taylor and Gollop, above n 673.
678 See in this respect: s 5(d) – The overarching principle that consideration must be given to the wishes to the child having regard to the child’s age, maturity and culture; s 5(e) – The further principle that efforts should be made to obtain the support of the child to any action or decision under the Act; s 10 – The requirement to explain to a child in a manner or language the child understands of the nature of the proceedings, of any Court order that may be made etc and the right to appeal or seek variation; s 11 – This sets out the duty of the Court and the lawyer to encourage and assist the child to take part in proceedings; s 22(1)(a) – allows children to attend the family group conferences; ss 159 and 163 – The appointment of a lawyer to represent the child and/or the appointment of a lay advocate; ss 166(1)(c) and 167 – allow the judge to ask others to leave the Court whilst the child gives evidence or talks to the Judge; s 170(1)(c) – provides for the entitlement of a child to attend a mediation conference. As for relevant literature on the point, see Simon Jefferson “Counsel appointed to represent children under the Children Young Persons and Their Families Act 1989” (1993) 1(2) BFLJ 40 at 45; Al-Alawi, above n 511; James, above n 242; Murray Cochrane “Participation rights under s 170 of the Children, Young Persons, and Their Families Act 1989” (2004) 4(10) BFLJ 249.
679 The Family Law Section working group (of which I was a member) and which prepared the initial draft for the New Zealand Law Society’s submissions on Vulnerable Children Bill, recommended that s 5(d) be repealed and replaced by a provision that reflected s 6(2) of COCA.
681 There has been a plethora of literature on the role of lawyer appointed to represent children. See for example papers presented at most, if not all of the New Zealand Law Society Conferences that have been held since 1991, (and including the Advanced Lawyer for Child workshops), and in addition, amongst others: Al-Alawi, above n 511; John Caldwell “Counsel for the Child – Old truths, a new start” in Reviewing the Role Thinking Outside the Square (NZ Law Society Advanced Counsel for the Child Workshop, October 2004); Garry Colin “The Role of Lawyer for Child” in New Zealand Law Society Review of the Family Court (Family Law Section Symposium, June 2010) 89-114; Cooke, above, n 40; J Doogue “A Seismic Shift or a Minor Realignment? A
under this stature. COCA is also important due to its indirect influence on the Act. The much clearer mandate COCA brings to the obligation to hear and take into account the voices of children has been transposed over to the Act in terms of everyday practice.682

When an application is made for orders under COCA (accompanying an application for discharge of the CYPF Act orders), the child will be represented by a lawyer (usually the same one appointed under the original CYPF Act proceedings). COCA contains a clear and unequivocal duty for the Court, set out in s 6, to take into account the views expressed by children. The Act, however, continues to use ‘wishes’. This invokes a more whimsical expression on the part of children as opposed to the more direct ‘views’. Relevant here is the observation of the High Court in C v S where the expression ‘views’ in s 6 of COCA was contrasted with “wishes” as found in s 23(2) of the now repealed Guardianship Act:

[31(d)] “The use of the expression “views” is consistent with art 12 of the Convention but may be contrasted with the term “wishes” used in s 23(2) of the Guardianship Act. One commentator has expressed the opinion that “views” is a wider term than “wishes” (see the views of Professor Mark Henaghan in a paper entitled “The Impact of the Care of Children Act 2004 on Family Law Practice”, presented at the October 2005 Family Law Conference already mentioned). I agree with Professor Henaghan’s views in that respect. A “wish” may be considered to be the expression of a child’s preference (for example, to be in the day-to-day care of one parent rather than another). Whereas “views” may cover a wider range of matters, such as an assessment of the advantages and disadvantages of being in the care of one party or another; what the child enjoys or does not enjoy about his relationship with the adults in question; and what matters are important to the child and what are not. As Priestley J observed in R v S [2004] NZFLR 207 at para [106], “[y]oung children very rarely express wishes.” But they may well have helpful views on matters such as I have elaborated. Indeed the expression of subjective “wishes” may be of less assistance to the Court than the wider views in the sense discussed. Particularly if the child’s wishes vary over time or are equivocal. As

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682 Personal experience as a practicing lawyer in the Family Court. This is notwithstanding the difference in wording between the two statutes.
well, there are well-recognised risks of “wishes” being prompted by an overanxious parent, or of a child responding in accordance with the child’s perception of the answer expected by the interviewer.  

The implication/presumption is that under COCA, as opposed to the Act, a child has the greater capacity to understand its situation and to form legitimate views about their family circumstances. There is no reason, in logic or in fairness, for those children under the CYPF Act to be treated differently. Issues that arise under COCA can involve issues of abuse, just as they do under the CYPF Act. Children involved in COCA proceedings can be faced with the reality of losing their relationship with a parent. Notwithstanding the differences in wording between the CYPF Act and its reference to “wishes”, and COCA with its reference to “views”, in New Zealand’s contemporary jurisprudence they are now read as conveying the same meaning. A child’s voice is to be heard at all steps of the proceedings, and even young children (for example a four year old) have to have the opportunity to express a view which might be material to his care arrangements. The Court of Appeal, when considering the appeal from the High Court where those principles were enunciated, stated:

Despite the generality of the language of s6, it must be applied in a sensible way. There is not much point in requiring a court to ascertain the views of a child who is not capable of having or forming a view which is material. As to this, we see some flexibility in the expression “reasonable opportunities.” We accept, as Randerson J

7.11 Case law - views

There is now considerable jurisprudence and literature on the issue of a child’s ‘views’, primarily under COCA. However, there is little, if any, substantive discussion in the CYPF Act case law. Guidance can nonetheless be derived from the COCA case law, notwithstanding that CYPF proceedings occur in a different statutory context. A child’s voice is to be heard at all steps of the proceedings, and even young children (for example a four year old) have to have the opportunity to express a view which might be material to his care arrangements. The Court of Appeal, when considering the appeal from the High Court where those principles were enunciated, stated:

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683 C v S [2006] 3 NZLR 420 (HC).
684 Cooke, above, n 40.
685 This will be the case from 2014 onwards and the changes wrought by s 9B of the Act.
686 C v S above n 683, at [31(d)].
687 At [31(d)], and also at [33], in the context of s 6 of COCA.
did that even a child as young as four could have and express views which might be material to her care arrangements and which ought to be taken into account when decisions are being made about those care arrangements.688

7.11.1 Age and maturity considerations

Simply because the proceedings will be under the Act and not COCA, does not necessarily requires a different perspective to be taken about what a children says about his or her situation. The Court is required by s 5 (d) to give consideration to the wishes of the child. That section also includes the qualification that expressed wishes are to be being given such weight as is appropriate having regard to age, maturity (and culture) of the child. This is consistent with Article 12.1 of UNCROC,689 although the latter does not refer to ‘culture’. COCA does not contain this qualification.690 However, in terms of day-to-day practice, nothing has changed. When a judge determines a case the views expressed by the child will be heard, but this is a secondary consideration when seen in the context of the overall welfare and best interests test.691

Although the Act and UNCROC continue to include the qualifying words as to age and maturity, it would nonetheless be inappropriate for the Court to make a determination that views/wishes expressed by a child should not be taken into account by simple reference to the chronological age of the child. This fails to have regard to the individual child’s developmental level and that child’s maturity. The ability of a young child in terms of age/maturity to express a view ideally should not be left to the assessment of either the lawyer appointed to represent the child or to the judge as they will not generally have any particular

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688 This case went on appeal (C v S CA 115/06, 18 October 2006). The Court of Appeal concluded by drawing a distinction between a child (aged five years, the child in that case having attained that age at the time of the appeal) expressing a view on his care arrangements and the issue the Court of Appeal was determining – the legal consequences of a failure to comply with s 6 of COCA. It was therefore not necessary for the Court of Appeal to seek the views of the child. This may result in lower Courts concluding that the question for determination is by its nature too technical or complicated, in a legal or other sense, for a child to have views which would be material to the issue to be determined. (It could be argued that ascertaining the views of a “younger child” who has been permanently placed about contact with birth parents may be too technical or too complicated for that child to comprehend. This writer has argued this in a case where he was lawyer for the children who had been permanently placed. A psychological report was obtained. The psychologist also thought the children were too young to have views that could or should be taken into account.)

689 The injunction in COCA at s 6 on the Court to give a child reasonable opportunities to express views and to take those views into account is not as a matter of law subject to the same qualification. This is in contrast to s 23(2) of the Guardianship Act 1968.

690 In contrast to s 23(2) of the Guardianship Act 1968. Section 23(1) contained the welfare and best interests test with that being qualified by the age and maturity provision in subsection (2).

691 See for example, MM v DM (2005) 24 FRNZ 389.
expertise or training, but will often have sufficient basic knowledge and understanding of child development and of the fundamental rules about interviewing children. The more technical aspects of interviewing children – of understanding how they think and communicate, of knowing that thinking is dependent on factors such as memory, emotional development and language formation692 is a matter that ideally requires expert evidence which can only be obtained from a psychologist.693 However, in practice, and other than where a case is going to hearing, the views of a child will be obtained by the lawyer appointed to represent the child, and given the nature of the case, by social workers.

7.12 Conclusion
This chapter commenced by considering policy in respect of family law in general and the CYPF Act in particular. There is no clear thematic structure to New Zealand’s family law framework, although the influence of the proponents of New Right economics cannot be denied when looking at the family-focus of the Act and the 2013 amendments to the private law relating to the care of children.694 The Act reflects a tripartite convergence between the economic model that looks to a lesser role of the State (coupled with a desire to cut expenditure), the desire of Māori to have a statute reflecting cultural aspirations, and the ‘rescue’ model of the Child Welfare Act 1925 and the Children and Young Persons Act 1974. New Zealand has had no overall family law policy in the sense that the family law statutes concerning children have been driven by discrete and specific agendas in the absence of any unifying and coherent analysis taking place. Legislation has been driven by the specific political and policy agendas of the time. This is apparent when the Act is examined in light of the four Fox Harding models. There is no direct synthesis between policy and practice with the application of a pure form of these models. Various aspects of each may be present at any particular time of the Act’s operation. Ultimately, the obligation of the State to the

693 See for example JM Doogue and SJY Blackwell “How do we best serve children in proceedings in the Family Court?” (2000) 3 BFLJ 183-204, who conclude that the appointment of a psychologist is ideally the most appropriate way to ensure that the views of a child are properly placed before the Court in terms of providing context, and in ascertaining influences on the child’s expressed utterances. However, in practice, a psychologist, whether in proceedings under COCA or the CYPF Act, will not be instructed solely to ascertain the views of children. This can occur but as an adjunct to more substantive issues concerning the child that are of concern to the Court.
694 These are the amendments made in particular to the Care of Children Act 2004 and the Family Courts Act 1980. Inherent in these reforms is the perspective that families can resolve their own issues and that lawyers are no necessary to that process.
permanently placed child is subject to markedly different interpretations, which have regard to the values that the society for the time being espouses, as well as cultural dimensions. This dynamic is being played out contemporaneously with the writing of this thesis as the Government undertakes the review of the Family Court in respect of the settlement of private disputes about children and the concurrent discussion about how the State should address issues concerning those who may be classified as ‘vulnerable’ in our society, which includes children but goes beyond them. The prevailing philosophical drivers behind the reform of the Family Court are firstly, a desire to cut the costs incurred by Government, and secondly, but nonetheless related agenda of redefining and reshaping the final responsibility for resolving disputes about children from that of the State (a greater societal good) to being a matter of private responsibility, and in this sense broadly coming within the first of the models described by Fox Harding, albeit without the patriarchal component being present.

The way in which the State carries out the responsibilities it has to children who are to be, or who have been, permanently placed encompasses quite distinct aspects of the first, second and third of the Fox Harding models. The emphasis on achieving an early permanent placement once the conclusion is reached that the child is not to be returned home, is a feature of the first and second models. The injunction in the Act about sustaining [birth] family relationships for the permanently placed child is a dynamic of the third model. The way in which the State deals with the permanently placed child in terms of having the caregivers apply as soon as possible for orders under COCA and the limitations prescribed by the Home for Life policy, constitutes the application of the laissez-faire model. This is the State saying that its role is limited and that the task of addressing issues presented in parenting the permanently placed child will fall to the new family to address through either its own resources and/or by utilising resources generally available to families and children as provided by health, education and accident compensation providers.

Mindful of the issues that confront the child who has been permanently placed, there is no doubt that the child has the right to be heard. Of critical importance here is ensuring that the views held by the child are ascertained and understood in the most professional and child-focused way possible. This requires family and professionals to be aware of both their skills in respect of the child and, importantly, their limitations. The fundamental task that is

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involved in this process is that with the assistance of those supporting adults with whom the child lives (or who are working with the child) he or she is able to make better sense of the situation – of not living with their birth family and of being in a new family or living in an environment that is intended to enable the child to make the transition to independence. The role of the lawyer for child in Family Court proceedings, whether those proceedings are under the CYPF Act or COCA, is accepted.\textsuperscript{696} Certainly the appointment of a lawyer to represent the child will allow the child to more effectively participate in the proceedings and have their voice heard, as it is part of the duty and obligation of the lawyer so appointed to place before the Court the views of that child in respect of the issues before the Court.

The next chapter looks at the special place of Māori children in the scheme of the CYPF Act and the permanency discussion.

\textsuperscript{696} Under the Act the lawyer for the child is appointed under s 159. Under COCA the appointment is under s 7. The role of the lawyer in COCA proceedings is currently under review by the Government and the exact parameters of the role remain unclear, although the role has been retained. There is no provision in the Adoption Act 1955 for the appointment of a lawyer to represent the child. Rather, and in order to get around that absence, the Court will appoint a lawyer to assist the Court. There is no provision in the Adoption Act for that appointment. It is presumably done on the basis of the Court having the ability to do so in the exercise of its power within its statutory jurisdiction. See \textit{McMenamin v Attorney-General} [1985] 2 NZLR 274 (CA).
CHAPTER EIGHT

The CYPF Act and Māori Children

I am the daughter of a transracially adopted Māori woman who has not been able to obtain information about her Māori heritage. My mother is visibly Māori, I am able to pass as Pakeha. Do I have the right to say, "I am Māori"? If so, what gives me that right? My mother does not know her whakapapa (genealogy); therefore I do not know my whakapapa. We have both been brought up within Pakeha society. Neither of us have participated within Māori society. Hence I ask the question again, "Do I have a right to claim a Māori identity?" I believe that I can identify as a descendant of Māori, but I do not believe that I can claim to be Māori as I do not know my whakapapa, I do not know my iwi (people, tribe) affiliation, I do not know the name of my marae, I do not have a tiirangawaewae (place to belong).697

8.1 Introduction

Any exploration of the role of the State in respect of children who are in the care of the State and will not be returned home to their families of birth of origin needs to examine the situation for Māori children. This chapter address this specific dynamic because of the specific paradigm within which Māori see children, families and related concepts, including “aspirations to maintain “tikanga Māori, distinctively Māori ways of ordering social life,”698 and of their role in society.699 This captures the essence of Māori as ‘tangata whenua’ of New Zealand. This literally means “land people”.700 Māori have a quite different world view than non-Māori, and it is therefore necessary to take into account the “real and fundamental

697 Erica Newman “A Right To Be Maori? Identity formation of Māori adoptees” (MA Thesis, University of Otago, 2012) at 1. The paragraph finishes thus: “This has been the inspiration of this thesis topic. In my own journey of identity I have wondered if others have felt the way I do. Do they have the same experiences as my mother, and, how do other Māori adoptees and their descendants identify themselves?”
699 Within a wider discourse there is the role of the Treaty of Waitangi and its significance in the body politic. This embraces a discussion far wider than this thesis. It is sufficient to note the special relationship between Māori and the Government created by the Treaty on its being signed on 6 February 1840.
differences between Māori ideas and practices regarding the family” and the non-Māori (primarily Pākehā) perspective.⁷⁰¹

The opening quotation above, taken from Erica Newman’s thesis, is particularly apt in respect of the identity issues that can emerge for Māori children who are in care and who must be permanently placed. Many of these children are placed within their whānau or their hapū. However, such placements many not occur for others, or they may be placed within whānau or their hapū but lack any knowledge of who they are. For many no issue will arise in either respect as they will be placed within their whānau or their hapū. The discussion that follows is in respect of those children who either have no knowledge of their whakapapa in the first instance or who are placed outside of their whānau or their hapū. This is in respect of both placement and contact with their birth family once that permanent placement has occurred. This chapter therefore considers placement and contact implications for Māori children who are in the care of the State and who will not be returned to their whānau. It discusses the responsibility the State has to these children and how that may be addressed.

8.2 **Specific terms used in this chapter:**

*Hapū:* Hapū is made up of a number of whānau and is the middle tier in a hierarchy of groups organised on the basis of descent.⁷⁰² All those within the hapū are derived from a common ancestor. In Māori society the hapū was the most important social, economic and political unit.⁷⁰³ The contemporary translation is of ‘sub-tribe’.⁷⁰⁴ This “probably understates the earlier significance of the term”.⁷⁰⁵

*Iwi:* This is the top tier of the three groupings within Māori society. Each iwi is made up of related hapū and is associated with a regional territory.⁷⁰⁶ Its modern usage, from the 19th century, denotes a distinguishable group of people, to the notions in English of a ‘people or

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⁷⁰² Ruru, at 61.


⁷⁰⁴ Ruru, above.

⁷⁰⁵ Benton, Frame and Meredith, above at 71.

⁷⁰⁶ Ruru, above n 704, at 61.
‘nation’ and through the Māori translations of the bible took on the persona of the ‘tribe’ in a “sense of a socially and politically cohesive named kin group or federation of kin groups”.707

**Tikanga:** This, more or less, translates from Māori as ‘law’. “Tikanga derives from tīka, meaning “straight, direct, keeping a direct course, tied in the moral connotations of justice and fairness, including notions such as ‘right, correct’”.708 The addition of the suffix ‘ngā’ renders it a system, value or principle, which is correct, just or proper.”709 It therefore involves an obligation to do something in the “right way” and to be “just and correct.”710 Mead defines tikanga as a “set of beliefs associated with practices and procedures to be followed in conducting the affairs of a group or an individual.”711 Tikanga crosses the spectrum in terms of scale and context.

**Whānau:** This is the smallest of the three social groups in Māori society. A number of whānau constitute a hapū. The whānau is a group of relatives defined by reference to a recent ancestor, embracing several generations, several nuclear families and several households, and can be characterised by the notion of an ‘extended family’.712 A functioning whānau is a living entity, with its members bound to each other by aroha.713 It will be centred in specific symbols such as a name, a land base,714 taonga715 and whakapapa.716 The whānau operates to fulfil four main functions: the care and management of tūrangawaewae and taonga, organising gatherings of members,717 the provision of mutual support and hospitality, and the socialisation of children. They are not exclusive groups and an individual may belong to more than one whānau. Contemporary whānau may not have an ancestral community reflecting the urbanisation of Māori since 1945. There are therefore varying degrees of

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707 Benton, Frame and Meredith, above n 703, at 100.
708 Benton, Frame and Meredith at 429.
709 Pitama, Ririnui, and Mikaere, above n 706, at 23.
710 Ruru, at 59.
712 Benton, Frame and Meredith at 521.
713 Meaning ‘loyalty and affection.’
714 A tūrangawaewae, which may include a marae and other landholdings.
715 Translated as ‘treasure’.
716 See below.
717 Referred to as ‘hui’. Erica Newman, above n 700. See also Benton, Frame and Meredith, at 97-98.
cohesion and effectiveness reflecting physical proximity of members and homes, their economic situation and leadership.  

*Whanaungataga*: This embodies the nature for Māori of being a relative, their relationships to members of their whānau, hapū and iwi, and to other Māori, and to the world around them. It entails a complex web of never-ending reciprocal responsibilities and obligations to others of the community.  

*Whakapapa*: Whakapapa is central to Māori life as it ensures the interconnectedness of all living things. This brings about the necessity to maintain a state of balance in all things and at all times. “The preservation of balance - between people and the gods, people and the environment, the generations, women and men, and the internal balance (spiritual, physical, emotional,) of every person – is of paramount importance.” In modern Māori it is often used as a verb – to “trace one’s ancestry back to a particular point of connection”.  

### 8.3 Māori Children: A statistical picture

The Law Commission, in its report on adoption, “focused on Māori views because of the unique status that Māori occupy as tangata whenua and as partners to the Treaty of Waitangi.” “Article II of the Treaty affirms the right of Māori to cultural identity and …participation in the Māori world (through the protection of Māori values.” Those who identify as being of Māori descent constitute about 15 per cent of the New Zealand population.

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718 Ruru, above n 704 at 59-62.
719 Benton, Frame and Meredith, above n 703, at 524; Pitama, Ririnui, and Mikaere, above n 706, at 22.
720 Pitama, Ririnui, and Mikaere, at 22.
721 Benton, Frame and Meredith, at 504.
722 Law Commission, above n 565, at 73. There is a significant literature on the Treaty of Waitangi. Primary amongst the many is Claudia Orange *The Treaty of Waitangi* (Allen and Unwin, Wellington, 1987).
However, Māori children are over represented in the ethnic breakdown of children in care, with 51 per cent of children in care in 2010 being Māori.  

<table>
<thead>
<tr>
<th>2010 (as at 30 June)</th>
<th>2011 (as at 30 June)</th>
<th>2012 (as at 30 June)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Māori children in care</td>
<td>Māori children in care</td>
<td>Māori children in care</td>
</tr>
<tr>
<td>2186</td>
<td>1901</td>
<td>2030</td>
</tr>
<tr>
<td>Total children in care</td>
<td>Total children in care</td>
<td>Total children in care</td>
</tr>
<tr>
<td>4,238</td>
<td>3,885</td>
<td>3,884</td>
</tr>
<tr>
<td>Per centage of Māori children</td>
<td>Per centage Māori children</td>
<td>Per centage Māori children</td>
</tr>
<tr>
<td>51.5</td>
<td>48.93</td>
<td>52.2</td>
</tr>
</tbody>
</table>

The figures are stark: Māori children generally are particularly vulnerable in respect of being abused, or being the victims of homicide. They perform less well than non-Māori children in respect of education, health, nutrition and drug and alcohol abuse statistics. In respect of life expectancy, Māori whānau are more likely than the general population to experience the stressors (financial, youthful and sole parenthood) and difficulties (mental and physical ill-health and addiction issues) that make them, and their children, vulnerable to

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724 Ruru, above. But note as well the observation of Emily Keddell “Cultural Identity and the Children young Persons and Their Families Act 1989: Ideology, Policy and Practice” (2007) 32 Social Policy Journal of New Zealand 49 – 71, that although there is a strong Māori identity for some, and she notes the 20% of children born to both a Māori parent and a pākehā parent who are categorised as solely Māori, there are nonetheless 15% of those who have Māori ancestry identify as non-Māori.

725 As provided to me by Tania Williams. See also Cram, above n 723; Nicola Atwool “Who Cares? The Role of Attachment Assessments in Decision-making for Children in Care” (PhD Dissertation, University of Otago, November 2008); Keddell, above n 727; As at June 2006, Māori children made up 24% of the child population but were over-represented at 45.2% of the care population. (Pākehā and Pacifica children were under-represented.) The Treasury Care and Protection EXG Review, Permanency (Treasury, Wellington, 15 November 2008). (Cabinet Paper prepared for the Cabinet Committee on Government expenditure and Administration.) It should be noted that Māori children are also over-represented in the notifications made to the Chief Executive. The Ministry of Social Development Statistical Report 2011, above n 48, states 46% of the notifications received between 2008/2009 and 2010/2011 and which required further action involved Māori children.


727 See for example Cram, above n 723; Mason Durie Te Mana, Te Kawatanga: the Politics of Māori Self-Determination (Oxford University Press, Auckland, 1998); Mason Durie Launching Māori Futures, (Huia Publishing, Wellington, 2003); David Fergusson and others “From evidence to policy, programmes and interventions” in Peter Gluckman and Harlene Hayne (Co-chairs) Improving the Transition: Reducing social and Psychological Morbidity During Adolescence, A Report from the Prime Minister’s Chief Science Adviser (Office of the Prime Minister’s Science Advisory Committee, Auckland, May 2011); Ruru, above n 704.
poverty, violence, child abuse and neglect. Further, Māori children have to deal with negative stereotypes coming from mainstream Pākehā life and media of what it is to be Māori. Lastly, Māori children in care must also deal with another issue: they are there because of family neglect and abuse and this occurs within the rhetoric of a cultural paradigm of Māori children belonging to a familial system – of whānau and iwi - that is safe and where children are taonga.

8.4 The Māori perspective of children

For Māori, children are precious treasures, or taonga: taonga is an expression of:

… comparatively recent usage, and essentially metaphorical. Taonga … are both tangible, such as mere and hei-tiki (greenstone weapons and ornaments) and intangible, such as language and knowledge. They belong to a descent group but at any given time are held by individuals on its behalf, in trust for future generations. As taonga children are to be treated with respect, responsibility, love and care by all members of the group.

As such, Māori children were never, and still today are not, the exclusive property of their parents as they are in Pākehā society. Rather, they are the children not only of their parents, but also of their whānau and hapū. The child is a member of a wider kin group that has traditionally exercised responsibility for the care of the child. Māori children belong to their whānau, hapū and iwi, with the “physical, social and spiritual well-being of a Māori child


731 Ruru, above n 704, at 63 – 64. See also Metge, above n 7018; Newman, above n 697, at 14.

732 See for example, Atwool, above n 728; Metge, above; Newman, at 13; Rangihau, above n 18, at 74 – 75; Ruru, at 63 who notes that children are “ātātou tamariki” (the children of many of us) as well as “ā tāua tamariki” (the children of two).

733 Atwool, above n 728, at 210. Atwool goes on to say: “The identity of Māori children is inextricably linked to whakapapa (genealogy) and this, in turn, links with them to specific places, symbolised by mountains and rivers. Whether living in this locality or not, this is their Tūrangawaewae or primary place of belonging”; Mead, above n 714; Ruru, at 47 – 80.
is inextricably related to the sense of belonging to a wider whānau group. This was, and is, the case for whāngai children too. Whāngai children are cared for by relatives, both within and without the hapū, of the child. Their placement could not be with strangers or into another culture as this was an avoidable act of cultural violence.

It is through this specific paradigm of familial life being recognised that whānaungatanga is expressed and mana enhanced. Integral to this is mauriora, the development of a secure cultural identity, which among indigenous peoples is a prerequisite promoting health, wellness and social capital. For children whose origin is that of a minority group, culture provides a way in which to obtain external strengths. This is also gained for Māori via whakapapa, through which Māori children learn their specific genealogical story. This is inclusive of their ancestors and is the means by which they develop an understanding of who they are, that they can, in turn, pass onto their own children.

8.5 Colonisation and assimilation

This fundamental worldview of the nature of children is clearly at odds with the English-New Zealand legal paradigm of children. Consequently, the imposition of an anglo-centric legal system, whereby children were not seen as belonging to the wider whānau or hapū, led to

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734 Rangihau, at 30. The Law Commission, above n 562, in respect of adoptions and Māori, noted at 80 that for the purpose of adoption children, once the order is made, are treated as children of the adoptive use and ceased to be children of the birth parents. The Adoption Act therefore is seen to be an imposition on customary rules relating to lines of descent. The commission went on to note that nonetheless some participants at a hui convened around New Zealand by the Commission to discuss adoption argued that no law can break the links of blood in Māori tradition, so although the Adoption Act alters familial relationships in law, does not necessarily do so in fact, as Māori children adopted with a multi-families know their family connections and relationships.” See also Ruru, above at 72 – 74.

735 This occurred when a child was not raised by its parents but by relatives, a system of care not involving permanent placement of the child nor preventing the child from having access to biological parents or to their history. The origin of whāngai derived from Māui-tiki-ā-Taranga who was thought to be still-born, cast into the ocean but found by a grandparent who raised him, becoming his mātua whāngai (feeding/nurturing parents). Newman, above n 700, at 13.


737 See the definition of this expression at 196.

738 Ruru, above n 704, at 70.

739 Durie, Launching Māori Futures, above n 682, at 148. The absence of such an identity is associated with poor health (especially mental health).

740 Keddell, above n 727, at 50. Benton, Frame and Meredith, above n 703, at 239, observe that the concept is “difficult to grasp because it encapsulates two related but distinct ideas; the life principle or essential quality of a being or entity, and a physical object in which this essence has been located.”

741 Atwool, above n 728, at 211.

742 Newman, at 16.

743 See the discussion at Chapters Five and Ten which respectively consider how the State has perceived children and when and how intervention has occurred, and at the permanency paradigm.
dislocation and discontent at all levels of Māori society. Legislative reform from the Native Land Act 1901 (which required registration\textsuperscript{744} of whāngai children and its subsequent 1910 amendment which removed legal recognition to whāngai placements)\textsuperscript{745} saw a further and related process of disempowerment for Māori. Although Māori could formally adopt Māori children and Pākehā could adopt Māori children,\textsuperscript{746} it was not permissible for Māori to adopt Pākehā children. The adopted Māori child assumed a new lineage, but not the binding ties that ordinarily exist between a child and its parents.\textsuperscript{747} The distancing of Māori from their cultural norms continued with the Māori Affairs Act 1953 which removed recognition of Māori customary marriage and confirmed that no Māori since 1909 was able to adopt any “child in accordance with Māori custom.”\textsuperscript{748} Notwithstanding the passing of the Adoption Act 1955, the adoption of Māori children by Māori remained within the jurisdiction of the Māori Land Court until 1962. Adoptions then took place under the Adoption Act 1955, completing the process of legal assimilation.\textsuperscript{749}

The Children and Young Persons Act 1974\textsuperscript{750} and its administration by the (then) Department of Social Welfare continued, and was indicative of, that assimilist approach. Prior to the 1960s Māori child welfare was seen as being the responsibility of, and left to, the whānau.\textsuperscript{751}

\textsuperscript{744} Registration brought advantages in securing benefit payments, allowances, housing opportunities and succession rights in Māori land. Rangihau, above n 18, at 75.

\textsuperscript{745} Newman, at 23. Whāngai placements still occur of course. For a recent instance before the Family Court of a matter involving a whāngai placement see PED v MHB [Whāngai: Final parenting order] 2012 NZFLR 35. Paragraphs [4] – [12] contain a useful summary of whāngai and its use. The attachment paradigm was determinative. See also the case of T v T [2007] NZFLR 307 where the court respected a whāngai placement that had subsisted for 2 years (the child at the time of the judgment was aged 4 years). It did so expressly subject to the welfare and best interest test set out in ss 4 and 5 of COCA. See also n 807 above.

\textsuperscript{746} Such adoptions occurred with parental consent but not that of the child’s community.

\textsuperscript{747} Rangihau, above n 18, at 75.

\textsuperscript{748} Rangihau at 75.

\textsuperscript{749} Rangihau at 75- 76.

\textsuperscript{750} Similarly, the general welfare system – as manifested by the Social Welfare Act 1971 and the Social Security Act – was the subject of significant criticism in Puao-Te –Atu-Tu (day break). The welfare system was part of a system of institutional racism that ignored and froze out the cultures of those who were not of the majority. For minorities (Māori) to participate, Māori values and systems had to be subjugated to the dominant Pākehā culture. See Rangihau, at 19, paragraphs 45 and 46; see Keddell, above n 727; Ruru, above n 704, at 94, makes the same observation: Despite recent statutory changes, the “institutional structures …are so heavily weighted in favour of tikanga pākehā and against tikanga Māori.  

\textsuperscript{751} See PED v MHB [Whāngai: Final parenting order], above n 748, the Court in discussing the circumstances where whāngai was used, refers at paragraphs [10] and [11] to risk situations for the child due to parental mental health and/or alcohol issues or where there are accepted or known risks to the wellbeing of a child or particular whānau and where those risks are internal to the whānau. In both situations either the whānau or the “wider whanau” may intervene. This case is indicative of situations where there is an uneasy merging of tikanga Māori and statute law. The whāngai placement is ultimately challenged by the birth parents who seek return of the child; the caregivers refuse to do so and the case moves into the Family Court. See also PRR v LRN & RNP FC
This changed with the de-population of the rural countryside which drew Māori to the attention of the mainstream welfare authorities.\textsuperscript{752} The operation of the 1974 Act, with the removal and placement of Māori children in non-kin placements, conflicted with the belief that children should not be removed or isolated from their whānau. This caused significant anguish.\textsuperscript{753} There was little if any recourse at law for families whose children were taken, with “the only control”\textsuperscript{754} being provisions inserted into the Children and Young Persons Act in 1977 which required decision-makers to have regard to family groups and whānau when it came to questions of removal and placement of children. Māori children who were in foster care felt an absolute sense of dislocation when placed outside of their whānau.\textsuperscript{755}
8.6 Puao-Te-Ata-Tu

The discontent within Māori about what was happening to their tamariki and mokopuna was one manifestation of a powerful indigenous renaissance that was occurring at this time. This was exemplified by the report Puao-Te-Ata-Tu (Daybreak), the preface of which records that:

At the heart of the issue is a profound misunderstanding or ignorance of the place of the child in Māori society and its relationship with whānau, hapū iwi structures.

In the context of the CYPF Act and its genesis, it is hard to exaggerate the importance and influence of Puao-Te-Ata-Tu. This report played a highly significant role in the development of the CYPF Act in crystallising fundamental concerns Māori had about the role they played in society and how that was marginalised in the construction and operation of social policy in respect of children. Puao-Te-Ata-Tu had its origins in dissatisfaction with an original public discussion paper and the Children and Young Persons Bill introduced into Parliament in December 1986. The report highlighted issues (consequences) arising from the colonial settlement of New Zealand and the legacy of institutional racism within the then Department of Social Welfare. The report noted “several complaints of children being placed with children outside of the kin group to meet the child’s immediate and material needs but without any (any adequate) attempt to find foster parents within the hapū” and of hapū being rarely consulted, “often as an omission, but more usually through a positive opinion

although there was no mention of the ethnicity of the foster parents, “it is likely that many of these children were placed with Pakeha families.”

Children and grandchildren.

Cockburn, above n 614. This is not to overlook the agitation and work that occurred beforehand. For example, in 1984 the Women Against Racism Action Group, comprising staff of the Department of Social Welfare in Auckland, published a report on institutional racism in their workplace. As a result, the government later undertook to respond better to the needs of Māori. http://www.teara.govt.nz/en/anti-racism-and-treaty-of-waitangi-activism/page-4. Ranginui Walker Ka Whawahi Tonu Matou: Struggle Without End (Penguin, Auckland, 2004) 277-281. Walker notes that the Women Racism Action Group reported that a survey of staff in the Auckland (Tamaki-makau-rau) region, Pākehā outnumbered Māori by 15:1 whereas the national average was 9:1. Ninety-nine % of staff spoke English, 3% Samoan and 2% Māori. The imbalance in ethnic composition meant that there was no correlation to the client group. There was a significant bias in this respect. The processes of staff recruitment, training and promotion were all imbued with a Pākehā paradigm.

See for example the discussion in appendices 1 – 3 inclusive of Puao-Te-Ata-Tu –respectively entitled “Historical Perspective”, “Legal Perspective” and “The Faces of Racism.”

Rangihau, at 29.
that the hapū had no right to be involved, or because of an exaggerated emphasis on ‘confidentiality.’”

Puao-Te-Ata-Tu named the issue: “Institutional Racism.” Although the Bill and accompanying discussion paper were commended for their enlightened approach to children and their needs, and to the independence and integrity of the family, there was nonetheless significant criticism of its monocultural nature. Puao-Te-Ata-Tu noted that in respect of Māori:

… social work practices in regard to court procedures, adoption and family case work contributed to the breaking down of the whānau system and the traditional tribal responsibilities of the Māori lifestyle…[and with] [D]epartmental foster… frequently seen as insisting on unrealistically high standards… [T]he area of fostering and adoption and the practice of confidentiality caused considerable concern. This not only denied the extended family its traditional rights but often resulted in a child being placed without any information about tribal identity being available for proper consideration. It was also stated that adoptive and foster parents were selected on the Pākehā basis of material values, while the ability of Māori to bring a child up in its own whānau surrounded by tribal aroha, was ignored.

The Government accepted that the spirit and recommendations of Puao-Te-Ata-Tu should be incorporated into the Bill.

8.7 The Amending Bill/the CYPF Act

A significant feature of the Act was its emphasis on family and the imperative to keep children where possible within their families. This reflected the concern of Māori arising from their experience of the operation of the Act’s predecessors. Durie noted that the

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762 Rangihau, above, n 18 at 29.
763 At [46] and Appendix III, “The Faces of Racism” at 77. See also Mason Durie, above n 727.
764 Rangihau, at 23.
765 Cram, above n 726, at 4, notes that Te Punga, the departmental response to Puao-Te-Ata-Tu, was the subject of scepticism by many Māori. Te Punga was said to symbolise an anchor of departmental policy building on the momentum created by Puao-Te-Ata-Tu. (See Department of Child, Youth and Family Services Te Pounamu, manaaki tamariki, manaaki whānau (Department of Child, Youth and Family Services, Wellington, 2001) at 10), the concern expressed was that this anchor would operate to prevent the probability of the canoe of Puao-Te-Ata-Tu being allowed to move anywhere. There was a realisation by iwi that the Crown would not deliver on its stated commitment to partnership with iwi or to the departmental endorsement of the principal of whakapakari whānau.
Bill,\textsuperscript{767} as first drafted, “was felt by many Māori to over-emphasise the paramount interest of the child, ignoring whānau (family) rights … [with the Bill being] redrafted to reflect ‘the family centred focus’, ‘whānau decision making’, and ‘family orientated practice’. This was a “philosophical shift” that some commentators thought could “compromise the safety of the child”.\textsuperscript{768} However, the Act nonetheless retained the requirement that when children cannot be maintained in their birth families they must have the right to have their sense of continuity and personal and cultural identity maintained and for this to occur in a positive manner. This is for the purpose of protecting the Māori child from the “pervasive and detrimental effects of the dominant Pākehā culture as they enter the care system.”\textsuperscript{769}

\textbf{8.8 Implications for Permanent placements}

Law (the Act) and CYFS practice\textsuperscript{770} (and not overlooking UNCROC in this respect) supports the proposition that Māori children should be placed in culturally appropriate placements if they cannot be returned to their parents. However, a child who is placed in non-kin care and who has formed an attachment with new caregivers is unlikely to be removed from those caregivers. Where these placements occur, the challenge is to determine what contact arrangement can be implemented to ensure that the child’s welfare and best interests are met in terms of having a secure placement where attachments can be formed\textsuperscript{771} and at the same time ensuring that whakapapa connections to whānau and hapū (including with siblings who may not have been removed or who have been placed elsewhere) are sustained.

\textbf{8.8.1 Case law}

Judges of all Courts have expressed the importance of Māori children being appropriately placed – and for provision to be made for the child to have the opportunity to know and

\textsuperscript{767} The Children and Young Persons Bill, the intended successor to the Children and Young Persons Act 1974.

\textsuperscript{768} Durie, above \textit{Launching Māori Futures} 730, at 132. This was attributed to Pauline Tapp and Nicola Taylor, above n 560. (An amendment in 1994 saw s 6 of the CYPF Act changed so that the welfare of the child became the first and paramount consideration.)

\textsuperscript{769} See ss 5(b) and 13(iii) of the CYPF Act. Keddell, above n 727, at 50.

\textsuperscript{770} CYFS practice in this respect is discussed below in Chapter Ten. It is sufficient to note here that although the CYPF Act and policy both support placement of Māori children within whānau, hapū and iwi, this can be in conflict with timeframes (as prescribed by s 5(5) of the Act and the accompanying CYPF policy, and by issues of placement drift that results in attachment becoming a significant issue.

\textsuperscript{771} And reflecting s 13(h) of the CYPF Act.
understand their whakapapa. The Full Court of the High Court has noted that Māori children do have a special place, but that a whānau or hapū placement in itself was insufficient.\footnote{206}

The welfare of the child can never be considered in isolation. We accept the contentions of the appellant that the cultural background of the child is significant and that, in addition, the special position of a child within a Maori whanau, importing as it does not only cultural concepts but also concepts which are spiritual and which relate to the ancestral relationships and position of the child, must be kept in the forefront of the mind of those persons charged with the obligation of making decisions as to the future of the child. We accept the principles coming from the report Puao Te Atatu enshrined as they are in the Children, Young Persons and Their Families Act, but again it should be remembered that the CYPF Act itself makes it clear that this is a desirable end, not an imposed one. Regrettably there will be circumstances where placement within the whanau is inappropriate or impossible.

There was an explicit reference to the importance of whakapapa in \textit{Department of Child, Youth and Family Services v PMTM}:\footnote{773}

Section 13 of this Act is a very far reaching section and empowers the Tikanga of the Tangata Whenua by requiring Maori children to be treated by the Department of Child Youth & Family Services in a way which is consistent with their MaoRnga.\footnote{774} That has not occurred in this case. I am not satisfied that the plan for the care of this child complies with the principles of s 14 of the Act. My reasons for reaching that view are that I have inadequate information about L’s cultural position and I am not satisfied that she has been excluded, as she has from whanau, appropriately. At the very least this Act requires that L’s whakapapa is recognised more than it is being recognised at the moment.

\footnote{772 BP \textit{v Ministry of Social Development} [1997] NZLR 642, at 651. For other cases where the argument that blood trumps other matters relevant to the welfare and best interest legal test failed, see for example, \textit{B v Department of Social Welfare} (1998) 16 FRNZ 522 (CA); \textit{A v Ministry of Social Development} [2009] NZLR 625; \textit{K v G} [2004] NZLR 1105; See also \textit{CWD \& BND v KHM \& Others} FC Lower Hutt, FAM 2010-032-530, 12 November 2010, where it was said at [124]: “Despite being a family member in terms of the Act, the maternal aunt has no other connection to the child. The principles of the Act [COCA] were never intended to promote a rigid formula for determining day-to-day care issues. They are merely reminders to the court of factors to be taken into account and weighed in the overall consideration”.}

\footnote{773 \textit{Department of Child, Youth and Family Services v PMTM} FC Dunedin, FAM 2005 – 012 – 277. This was a decision of the then Principal Family Court Judge, Judge Boshier.}

\footnote{774 As directly reproduced from the judgment. The word being used would appear to be “Māoritanga”.

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The Family Court has in a number of cases grappled with the issue of sustaining a permanent placement for a Māori child, whether placed with non-kin or kin, in terms of honouring the principles of the Act requiring “as far as possible” the maintenance and strengthening of whānau relationships. In *Chief Executive, Ministry of Social Development v AB born in December 2008*, a case involving a two year old placed with her paternal uncle, the Court noted the s 13 principles and observed that the words emphasised in the preceding sentence are directive and more mandatory than where the expression “where practicable” is used.\(^775\)

The decision in *B v Ministry of Social Development*\(^776\) was an instance of a clear articulation of the Court’s analysis. Here, neither parent nor the grandparents, though Māori, had a Māori cultural upbringing or cultural affiliation. If the child had remained with her birth parents, she would not have been raised within a Māori cultural milieu, but as a Pākehā New Zealander.\(^777\) In considering the implications of the decision the following paragraphs are pertinent:

\[105\] This is a case where the child cannot remain with or be returned to her family, whanau, hapu, or family group i.e. either of her parents, her grandparents, aunts and uncles or cousins. Consequently in determining the person on whose care she should be placed, priority should, wherever practicable be given to a person who is a member of her hapu or iwi, or, if that is not possible, a person who has the same tribal, racial, ethnic or cultural background as the child.

\[106\] It would be wrong if s 13(g) was interpreted so that in every case where a child had a kin connection however remote, to an iwi, that placement with an iwi member would trump any other placement regardless of the other principles in the Act.

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\(^775\) *Chief Executive, Ministry of Social Development v AB born in December 2008* FC Lower Hutt, FAM 2010-032-03, 20 May 2011, at paragraph [9]. Access was directed to be reviewed under the plans to be filed by the Chief Executive. See for example, *R v Child youth and Family Services* FC Dunedin, FAM 2004-012-584, 14 December 2006; *McCallum & Litten v Fong & others*, above n 206.

\(^776\) *B v Ministry of Social Development* [2008] NZFLR 1012. Here a 15 month old Māori child was placed with non-kin caregivers. The Chief Executive proposed a placement with distant relatives. The birth mother and grandparents supported the current placement. The Chief Executive opposed the placement with one of the grounds being the absence of a family connection. The court made the orders as sought by the applicants. The child was securely attached to the caregivers.

\(^777\) Had the child been placed with the caregivers favoured by the Chief Executive the child would have been raised within tikanga Māori. See paragraphs [121] – [140] for the analysis in respect of the facts.
[107] One of the major concerns addressed by the Ministerial Advisory Committee in 1985, referred to in the Ministry's evidence, was the placement of Māori children away from whanau and hapu without consultation with those family members. A child in Māori society is the taonga and responsibility of the wider whanau and hapu, not just her parents. Grandparents, and aunts and uncles have a status in relation to a child which cannot be ignored.

In this case the attachment paradigm was paramount: the Judge stated: 778

… I am not satisfied that the blood link through 5 and 8 generations between this child and Mr and Mrs C is sufficient to prioritise their care for this child over that of Mr and Mrs B who have cared for her so well for over a year.

There are no doubt instances where culturally wrong placements occur either by consent or where there is no opposition raised to the particular outcome. For example, I have, on two recent occasions, been involved in cases where Māori children have been placed in new families and the placement was not one which could be said to be within whānau, hapū or iwi.779 In both instances, and this is typical, it was due to delay in effecting a permanent placement for the child. The child had formed a psychological attachment to the caregiver. The risk in terms of attachment is so profound that removal of that child from the placement, notwithstanding its cultural inappropriateness, could not be countenanced. This is a direct acknowledgement of the role played by the principle of attachment and the application of s13(h) of the Act. Another example concerns a case where I am the lawyer for three Māori children who are all permanently placed. Two are placed together in South Auckland (with Māori caregivers, but not members of the children’s whānau or hapū). The third child is placed in Hawkes Bay. The Family Court file for all three children remains in South

778 As above at paragraph [137].
779 In one I acted for the caregivers and advocated on their behalf for the placement being confirmed. The caregivers had one child of the birth parents in their care and with this occurring with the consent of the Chief Executive through the Papakura (a CYPF office in South Auckland). A second site then placed a younger sibling with the same family. Drift occurred, attachments were formed – and with the added dynamic of the sibling relationship. The Chief Executive opposed the permanent placement of the younger child but caved in without the need for a defended hearing. In the second case I acted for the NGO which had custody and guardianship. The NGO wanted to place the child in whānau placement – with an appropriate transition taking place. The caregiver applied for orders securing the permanent placement. This was initially opposed by the NGO. However, a psychological report obtained by the Family Court placed significant emphasis on the attachment and that the risks posed in removing the child from that secure placement were simply too great.
Auckland. The Chief Executive wants the Court file for this latter child sent to a Court in Hawkes Bay. I have opposed this on the basis that the Chief Executive has failed to ensure there is any physical contact taking place between the children, nor are any other processes in place for allowing the children to have sufficient knowledge of their whakapapa.

A case which classically illustrates the competing issues is the litigation involving baby T notwithstanding that this was not a case under the Act. The case involved placement of a Māori baby with Pākehā applicants. The Court was not prepared, in the first instance, to make a custody order in favour of the applicants (who resided in Australia), despite the mother and father consenting to the order, without wider consultation with the whānau, hapū and iwi of the child. The birth parents were totally opposed to a placement within their whānau or extended families. The parents had formally ‘gifted’ the baby to the applicants who had been present at the baby’s birth and had cared for him since that time. The Court called for a report from a social worker. The social worker opposed the placement noting the child’s Māori heritage. Although the parents had made arrangements for the care of the baby, the Court considered that the baby could be regarded as being in need of care or protection under s 14(1)(f) of the Act. The issue of concern was the placement of this Maori child with the applicants in circumstances where there could possibly be a more appropriate (cultural and ethnic) placement in New Zealand. The Court shared this concern and made a referral for a family group conference so that the extended whānau could be consulted. At the

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780 Re T (1999) 19 FRNZ 11 and a second judgment in the same case Re T (custody and guardianship) [2000] NZFLR 594. The case came to the Court when orders were sought under the Guardianship Act as a holding measure pending formalisation of placement arrangements in Australia. The applicants had intended to adopt the child in Australia. This was not possible as privately arranged adoptions were not permissible under Australian law.

781 The parents had a number of children who were all being cared for, or had been adopted by, other people. They considered that they could not care for this baby.

782 The principles in the Adoption (Intercountry) Act 1997 and UNCROC were said to support the importance of placement within the child's family and/or ethnic group. (Article 20 of UNROC, provides that when a child is removed from her family environment due regard shall be paid to the desirability of continuity in the child's ethnic, religious, cultural and linguistic background.)

783 Lawyer for the child in supporting the placement with the applicants, noted that any family group conference was unlikely to reach agreement, which it did not. The whānau supported the placement, the Chief Executive opposed it. The second judgment ([2000] NZFLR 594) noted the following comment of the judge as to the position of the Chief Executive: “I think I just need to add also a comment that Dr Davidson made gratuitously (with leave of the Court) after cross-examination had been completed. He expressed the fear that given what had occurred in this case, that if the position of the Chief Executive was upheld, given the consultation and the views of the respondents' whanau, that it would be replacing one form of paternalism of telling Maori what is right for them by another form of paternalism by telling them what is right for them, notwithstanding that there has been extensive consultation, as he mentioned, with the family group conference (p 601)."
second hearing, the Chief Executive supported placement of the child with the mother despite her previous parenting history and in the face of her opposition to the placement occurring. A cultural report was also available. This supported the placement with the applicants. The report identified issues for Māori and their children in coming to terms with placement of children outside of their whānau, hapū and iwi and of how competing issues have to be addressed.\textsuperscript{784}

This has been an interesting case for me in terms of using my cultural perspective to translate for the court some of the “cultural and ethnic implications” concerning T’s guardianship/custody placement.

I am of Ngati Porou, Ngapuhi and Ngati Kahunungu descent. In my own whanau I have a younger brother who is in fact my biological uncle. My partner is an Australian born Maori. Bred in Brisbane with whakapapa connections to Ngati Kahunungu, Tanenuiarangi and Raukawa. We have five children and are currently caring for my brother's teenage daughter. I have whanau overseas who belong and are still an active ingredient in the way that my whanau in Aotearoa make decision pertinent to our wellbeing. I have experienced firsthand the way in which Maori reconstruct pseudo whanau environments to survive when living outside of our own whanau, hapu and iwi papakainga (home turf).

I am fully conversant with Te Tiriti O Waitangi and the bi-polity relationship that it creates between Tangata Whenua and Tauiwi in Aotearoa/New Zealand. As a social work practitioner and private consultant I have experienced working with Maori struggling with personal cultural and ethnic identity crises because of cross-cultural fostering practices that isolated them from their Maori whanau, hapu and iwi.

At first glance, this seemed like a clear-cut case to me — this child should not be placed outside of whanau, and to think of Australians trying to foster/adopt a Maori child was preposterous. However, during the interview with both applicants and respondents my

\textsuperscript{784} [2000] NZFLR 594 at 597. The Court also obtained an orthodox psychological report. The psychologist found that the child was attached to the applicants. He also preceded his assessment, like the cultural report writer started from a premise that the placement seemed wrong. “that the thought of Europeans taking away a Maori child was not right. He said, posing himself the question: two Europeans taking away a Maori child was this right and I had reservations about that and I was prepared to see things about E, S, Ms R and others in terms of that particular prejudice. I've been involved in placement assessments in the past and this one is extraordinarily unique.” (At 600)
wairua was touched by the wairua of these people. T is blessed to have a whanau of this conception that understands the power of aroha and maneakitanga.

Subsequently I make a final point in reference to the issue of “losing a Maori child” to parents from overseas knowing that there are a large number of whanau wanting to adopt in New Zealand. This whole notion of losing a child is emotive and it would be far better if parties looked at what would be gained by the range of placements available for this child. Such an approach falls in line with what is called “mana enhancing” behaviour.

The Court supported the placement of baby T with the applicants in Australia and put in place a structure that would ensure the child would maintain his relationship with his birth whānau. In doing this the court noted that there was extensive evidence supporting the proposition that the relationship between the applicants and the caregivers would ensure this occurred.

**8.9 Contact issues for Māori children**

A dilemma for decision-makers in respect of Māori children is achieving an appropriate balance between the needs of the child to be able to form appropriate and necessary attachments to the new caregivers and of ensuring that the child is given the opportunity to maintain whānau/hapū connections and to have knowledge of their whakapapa and whaunaungatanga. This raises the purpose of contact in a case involving the permanent placement of a child. The policy of the Chief Executive is that contact is for identity knowledge only and, where direct contact is deemed appropriate, contact one to four times a year, all things being equal, is sufficient for this purpose. This frequency will enable the permanently placed child to develop an understanding of their birth family and life story.

This issue arose for consideration in *Chief Executive, Ministry of Social Development v DM.* This case involved a permanently placed child where social workers had reduced the contact between mother and daughter from being weekly (and supervised) to four times a

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785 Other than this chapter, I am not addressing the question of contact of contact.
786 *Chief Executive, Ministry of Social Development v DM* FC Rotorua, FAM-2007-077-89, 29 September 2008. This case concerned an application by a birth mother for access to her daughter. The child had been removed following her sustaining a non-accidental injury which was never explained. The Court had to consider the 2006 Permanency Policy. This contained the following statement of principle and purpose: “The permanency policy of Child Youth and Family (CYF) is to promote the interest and welfare of a child/young person in out of home care under Children Young Persons and Their Families Act 1989 (CYP and F Act) by establishing an enduring living arrangement that promotes a sense of belonging, attachment, continuity and stability”.

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year. The reasons for this reflected both the application of policy and a generic social work approach to such cases: firstly, the purpose of access is for biological identity only; secondly, the social worker was critical of the parents’ lack of willingness to engage with social workers; thirdly, the lack of acceptance by the parents that the child is in fact in need of care and protection; and fourthly, the suggestion that the parents are not emotionally supportive of the child’s placement and the child’s placement consequently would be undermined, and that too many visits would unsettle or undermine that placement, which was working well. The Court observed that it would have been preferable for there to have been some transparency or more specific information as to the reasons for and how the decision-making process relating to reduced contact was reached and, significantly, observed that “no assessment the child’s attachment or bonding to her parents was undertaken before contact was reduced.”

The judge commented at paragraph [71]:

A difficulty with such an approach is that it potentially prioritises a child's new care situation above all else. As was said by His Honour Judge Bosher, the Principal Family Court Judge, in Department of Child Youth and Family Services v PMTM …“I will not contemplate a plan that sees no contact for a period of time on the mistaken premise that stopping contact enables a child to become settled with permanent caregivers. That is no longer acceptable social work philosophy.”

The Court then canvassed the significance of whakapapa within the context of the CYPF Act and its applicable principles:

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87 At [62]. The Judge went onto say at [73] in respect of research relied on by the Chief Executive: “There is other literature on this issue …being an article by Barnardos of Australia entitled “Establishing Permanency for Children — the issues of contact between children and permanent foster care and their birth families”. The Barnardos article and a paper by Rita Derrick, of the permanent placement unit Auckland, were touched upon in Chief Executive Child, Youth and Family Services v PM FC Dunedin, FAM-2001-012-148, CYPF-012-50-01. Whilst not the subject of detailed observation by the Court, the judge noted that counsel in submissions had criticised the methodology of these articles, their lack of rigour, lack of peer review and, most significantly, their failure to objectively take into account the specific circumstances that exist for the child, the subject of the decision.

88 The court then reproduced paragraph [7.4] of the report: “According to tikanga Maori, whakapapa is the glue that binds whanau, hapu and iwi together. Knowledge of one’s whakapapa is a vital aspect of being Maori. … The importance of children having access to their whakapapa is poignantly expressed by a Maori woman who was legally adopted by strangers and who could not trace her whakapapa: In Maori terms your whakapapa gives you everything — it places you in the context of the world, and of your own culture. You know way way back, not only your immediate relations who are living now, or the grandparents who may have died, but right back though the tribes, the different canoes you could be related to, back to Hawaiki.”
D has a right to have and maintain links with her family and to also maintain her cultural identity, wherever possible. These considerations are contained in not only ss 5 and 13 of the CYPFA, but also Articles 8 and 9.3 of the United Nations Convention on the Rights of the Child (UNCROC). D has two siblings and it is important that she has an opportunity to maintain that relationship. Also, D's biological cultural background is New Zealand Maori and Samoan. The caregivers are New Zealand Maori and European. The concept of whakapapa is thus an important consideration. A recently released Ministry of Justice publication, “Guardianship, custody and access: Maori perspectives and experiences” discusses a notion that children are not the property of their parents, but rather belong to the whanau, hapu and iwi.

The High Court decision in Temple v Barr is a COCA case that looked at the situation of a Māori child who had been placed privately by mother with a Pākehā family and in anticipation of an adoption taking place. Mother wanted the child returned, having concerns that the child would not be educated on or understand her Māori heritage. A psychological report was obtained (but not a cultural report). The High Court upheld the decision of the Family Court to confirm the placement with the non-kin family. This was on the basis of the child being securely attached to the new family and to the child being exposed to risks of domestic violence should return occur. The Court had regard to the presence of the competing risk considerations: the harm caused by removing the child from a home where she was attached to the caregivers and the risks of her being alienated from her culture, heritage and biological roots. At paragraphs [117] and [118] the High Court stated:

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789 Temple v Barr HC Wellington, CIV-2010-485-561, 24 August 2010. The case is important as it involved the argument that a child should be raised by its parents. See [82] for the specific discussion of the application of the principles contained in s 5 of COCA. But see in contrast JH v FM FAM 2009-092-2474, 28 April 2010, a mother placed the child with strangers. In subsequent COCA proceedings the child, who was said to be attached to his caregiver in a placement that had endured for 8 months, was the subject of an order directing the transition of the child into the care of his father. The judge accepted that a biological connection was in itself insufficient; there was an importance for the child in being able to learn his whakapapa and hence his place in the world. The fact that there was a secure attachment with the caregivers would provide a useful scaffolding for the child to attach to his father. The length of time the child was with the caregivers was short in the totality of the child’s life. Orders were made accordingly.

790 The Court went on in the same paragraph to cite Joan Metger [sic] and Jacinta Ruru, “Māori Aspirations and Family Law Policy” Mark Henaghan and Bill Atkin (eds) in Family Law Policy in New Zealand above, at 52.: Children belong not only to their parents but also to the whānau, and beyond that to hapū and iwi. They are “ā tātou tamariki” (the children of us many (more than two)). Often they are referred to as taonga. This is a comparatively recent usage, and essentially metaphorical. Taonga (precious treasures) are both tangible, such as
It is, and will become more, important for the Barrs to recognise and actively encourage the value of Ruth having an assured place in her whānau, hapū and iwi with such access to Māori language, knowledge and tikanga. Those relationships need to be preserved and strengthened. I have referred to children belonging to themselves, not parents, biological or otherwise. The parties need to understand that in Māori thinking children are not the exclusive possession of their parents. Indeed the idea of possession and exclusion, separately or in association outrage Māori sensibilities.

[118] This simply means that the duty and responsibility is of all, which must include the psychological parents, and caregivers, the Barrs. And it matters not, from Ruth's point of view, that they are pākehā. They have the responsibility of day-to-day care — which is not to be the subject of interference from the wider group — and birth parents — so as to become a perceived threat to their role. But they also have the responsibility to ensure that Ruth be brought up with a knowledge of her cultural heritage as a Māori, especially language and tikanga, but also and more specifically, of the tribal history and whakapapa of her birth parents, and her heritage.

There has been one particular case where I have been involved in as lawyer for child that has seen this question of what it means for a Māori child to be permanently placed with a caregiver from a different ethnicity and culture being squarely addressed. The child had been removed from her teenage Māori/Cook Island Māori parents following suspected non-accidental injury. She was placed with a Pākehā caregiver who was of an age to be the child’s grandparent. The placement continued and the child formed an attachment to the caregiver. The birth mother maintained her relationship with the child and, ultimately, secured the support of the Chief Executive for return of the child. This was opposed by the caregiver. In the first of decisions the Court addressed the specific issue of concern, which although not expressed in terms of whakapapa had that concept nonetheless underpinning the

mere and heitiki (greenstone weapons and ornaments), and intangible, such as language and knowledge. They belong to a descent group but at any given time are held by individuals on its behalf, in trust for future generations. As taonga, children are to be treated with respect, responsibility, love, and care by all members of the group.”

791 This is a series of cases that can be bundled together under the name WAF v Ministry of Social Development, above n 663, from 18 May 2010, 4 May 2011, and 16 November 2011. See n 666 above. (These were all decisions of the then Principal Family Court Judge, Judge Boshier). The details of the case are noted below. There were subsequent substantive decisions in WF v Ministry of Social Development [2012] NZFLR 49 (HC); Re KP [2012] NZFC 6029, relating to access; and TV and LRP v WAF [2013] NZFC 2955, again relating to access.
decision-making that followed: “Culturally, the placement was not appropriate, and it became even less appropriate as [the child] developed”. In the 2011 judgment, in referring to the current state of law, the judge noted the need for the Court to “afford to [the child] the proper opportunity for her to grow up in her culture” and of the Court’s “heightened awareness of the importance of culture and family”. The judgment then recorded:

[63] I am now persuaded that given the overriding principles of the Act, K should be in her mother's care if possible. I can now responsibly attempt it given the safeguards in place. This has simply not been possible up until now. I acknowledge a degree of discomfort and I acknowledge uncertainties and even risks but I do not think that should dissuade me from the pathway set out in the plan. Obviously I have not only listened to the evidence intently but have reflected on all of the submissions filed by counsel. But in the end, I believe Mr Cooke is correct in his approach and, I adopt it. His submission is akin to my own thinking and the expert evidence supports the plan.794

[64] The stakes are high in this respect. If the plan fails I do not think we should continue to cast around for other options. For K's sake there should be certainty and I would see little choice but to then revert to the safe option, albeit less than ideal, of long-term placement with W F.

A difficulty that must be dealt with is the perception held by lawyers and judges, often rightly, on the facts of particular cases, that the Chief Executive places an emphasis on kin-

792 WAF v Ministry of Social Development, 18 May 2010 above at [101].
793 At [52] and [60] respectively. The Court had regard to the relevant legal principles as set out in the Act, to UNCROC and noted the decision of the Court of Appeal in B v Department of Social Welfare (1998) 16 FRNZ 552 (CA).
794 This writer was lawyer for child, “K”. The following is an extract from submissions filed for the 2010 hearing:
“Should K remain with Ms F? Is there still opportunity to effect return?
(50) Counsel poses the question: is that outcome necessarily in K’s best interests? This question must be asked for two primary reasons:
Evidence that Ms F cannot meet the cultural needs of K; and
Evidence that there is still time (and this should not be hurried - This would suggest that application of the s5(f) principle is not as straightforward as might be thought from K’s perspective for her parents (and the maternal family) to effect change – in terms of:
Addressing attachment issues;
(ii) Developing an understanding/insight into risk factors that exist for K in that household;
(iii) Addressing in a substantive and demonstrable way those issues of risk.
It is submitted that such opportunity exists, but within a narrow window of opportunity.
If the attachment issue is addressed – and it is established that K’s parents (and maternal family) can keep her safe from harm – see s 13(a) – children must be protected from harm, their rights upheld and their welfare promoted – then she should be returned to their care.
The timeframe for return cannot be left open-ended; to do so would be to ultimately lose sight of K’s welfare and best interests and subordinate those matters to those of the adults who have to effect change.
care over what the welfare and best interests of the child require.\textsuperscript{795} For example, in \textit{Chief Executive v AN} a grandmother and her daughter were caring for the daughter’s child and an unrelated child both of whom had special needs.\textsuperscript{796} Both children were attached to their caregivers. There were care and protection concerns for the children and a declaration was made. The Chief Executive, if granted custody, intended to move the child who was not a biological child of the family. The Chief Executive was criticised for failing to have regard to the reality of psychological parenthood. In the extensive litigation involving the \textit{Hanover Children} the High Court was critical of the failure of the Chief Executive to find new placements for the children because the responsible social work team, Kaitiaki, determined that, “because the children were Māori, they should not be placed outside of the whānau, and that in any event they were not in need of care and protection.”\textsuperscript{797}

\textbf{8.10 The process of placement of Māori children}

The permanent placement of all children who have been removed from whānau and families (and whether in a kin or non-kin placement) is one which ought to be both a specific child-focused and evidence-based inquiry and one that falls directly within the principles of the Act.\textsuperscript{798} A directly relevant factor here will be the child’s Māori reality – and how that has been, is being, and could be manifested. This cannot be a matter of either presumption or assumption. Both the Act and COCA provide a statutory framework whereby this can be addressed for the child in question. The Act has quite specific statutory provisions which guide social work and judicial decision-making. Relevant here are ss 5(b), 13(f) and (g). Section 5(b) specifies that a child's relationship with his or her whānau should, “wherever possible”, be maintained and strengthened. It is then necessary to turn to the more specific principles set out in s 13(f)(i)-(iii) and (g) which apply in cases of permanency. The former,

\textsuperscript{795} For present purposes the discussion is irrespective of the ethnicity of the children. See the discussion in respect of the \textit{Re T} litigation noted above at n 783 above. It can be noted that in that case, at the second hearing when the Court gave permission for the caregivers to return to Australia with the child, the Chief Executive sought a stay of that order to enable consideration to be given to an appeal. The judge refused to do so.

\textsuperscript{796} \textit{Chief Executive v AN} [2011] NZFLR 990.

\textsuperscript{797} \textit{Hanover Children} HC Auckland, CIV-2007-404-7415, 18 August 2011, at paragraphs [26]. This is a case involving significant litigation in the Family and High Courts and the Court of Appeal. The children had been found to be in the Family Court to be in need of care and protection but for reasons specific to the case, the matter had been transferred to the High Court. The children were placed under the guardianship of the High Court. The Court went on to comment at paragraph [28] that it was “extraordinary and indeed undesirable that cultural perceptions of this nature should have resulted in the Court’s agent failing to carry out the directions of both the High Court and the Court of Appeal.

\textsuperscript{798} This when the Court comes to the exercise of discharging the orders that are in force on application made by the caregivers of the child.
firstly, provides that where a child is removed from his or her whānau, that child should, wherever practicable be returned to, and protected from harm within that family, whānau, hapū or iwi;799 secondly, if immediate return is not possible, then the child should be placed in an appropriate family-like setting and with this being one where the links that the child has with his or her family, whānau, hapū or iwi can be maintained and strengthened; and thirdly, should the child not be able to be returned to, or protected from harm, within his or her family, whānau, hapū or iwi, the child should live in a new family-like setting in which he or she can develop a sense of belonging, and where his or her sense of continuity and personal and cultural identity are maintained.800 Section (g) provides that where a child cannot remain with or be returned to his or her family, whānau, hapū or iwi, in determining where the permanent placement should be, priority should be given to placing the child (where practicable) to a person who is a member of the child’s hapū (preferably) or iwi or if that is not possible, with someone of the same tribal, ethnic, or cultural background as the child.

Where the caregivers of a permanently placed Māori child801 make application for orders, once the CYPF Act orders are discharged (in accordance with the welfare and best interests assessment under that Act) the same task is carried out under COCA. This, similarly, has principles which must be taken into account by the Court when considering the applications for parenting orders.802 The specific and discrete inquiry under s 5(a), (b), (c), (d), and (f) of COCA takes place within the overarching paradigm of safety prescribed by s 5(e).803 That exercise must have regard to the inclusion of the references to family group, whānau, hapū, and iwi in paragraphs (b), (d), (e) of the section and to the reference in paragraph (f)804 to the

799 This principle is counterintuitive both the injunction in s 5(f) to deal with issues concerning children within the child’s timeframe and to the policy of the Chief Executive’s which looks to achieve a permanent placement of children within quite prescribed timeframes.
800 Although not referred to in the course of the litigation, this principle in fact underpinned the outcome of the WAF v Chief Executive litigation (above n 666 and n 794). At the same time, the s 5(f) principle (relating to child-focused time-frames for decision-making) was interpreted in a far broader way than is orthodox. This looked at the consequences for the child being in a culturally-foreign placement through to her being a teenager, as opposed to saying this is a 4 year old child who must have certainty of placement reflecting that she has been removed by the Chief Executive from the care of her parents and placed with a caregiver to whom she has formed an attachment.
801 As with all cases of course.
802 Section 4(2) of COCA directly applies here: “The welfare and best interests of the particular child in her particular circumstances must be considered.”
803 See the discussion of the Supreme Court in Kacem v Bashir [2010] NZFLR 884 (SC).
804 See in this respect the decision of T v T, above n 748, where the Court had to consider the appropriateness of continuing a whānai placement. At [23] the Judge stated: “The whangai agreement should be respected by this court (subject to the paramountcy of [the child’s] welfare and best interests). Further, it is appropriate to have
child’s culture and language. These are all matters that will be relevant between maintaining the connection for the child with the birth family whilst at the same time securing the child in that new family.805

8.11 Conclusion

It is beyond the scope of this thesis to explore the reasons why the numbers of Māori children who are in care are out of proportion to other ethnicities given the total number of Māori in society at large. It is enough to observe that there is a complex matrix of reasons as to why this is so806 and that the remedies required to address this are similarly complex.807 This is not a phenomenon confined to New Zealand.808 The Chief Executive therefore has quite specific and discrete responsibilities to Māori children who have been taken into care. It should be an integral aspect of the process, it being fundamental, that the “life story of Māori children is inextricably interwoven with whakapapa”809 that social workers with necessary skills must ensure that this is at the forefront of the intervention surrounding the child’s placement and preserved. Equally, as with all children, formal evidence is required to identify the nature of the relationship between both the child and its parents and between the child and the new caregivers.810 There must be an inquiry into how the child’s placement can regard for the customary practice of whangai given the obligation on the Court to consider all factors relevant to a child’s welfare”. The child had immediate needs for secure attachment and continuity in his day-to-day care – which would be sustained by the placement continuing. Further, at [25], the judge observed that the whāngai caregiver “lives by whanaungatanga and knows [the child’s] whakapapa”.

805 See in this respect the discussion in Gluckman and Hayne, above n 727, at 292-296 where there the need for and distinction between culturally appropriate and responsive programmes for Māori children is noted. The discussion regarding the Kaupapa Māori approach is of interest as is the observation that the [apparent] tension between the Western [science] perspective and that of Kaupapa Māori are not mutually exclusive or in tension.806 These reasons are multi-faceted and overlapping. See the literature referred to in this chapter, including Cram, above n 726, at 11, and Rangihau, above n 18. These factors include the consequences of: colonialism; systemic racism; the implementation and application of white middle-class standards and values, economic reform which result in significant unemployment, poor housing and low educational achievement.

807 See for example the discussion by Cram, above who at 9-10 summarises the agenda necessary to address this. A Māori model of whānau wellness is used, ‘Te Pae Mahutonga’. This involves invocation of firstly, ‘Mauri Ora’ (the understanding of Māori values within an historical context for removing any illusion that child maltreatment acceptable), secondly, ‘Te Ōranga (whereby inclusion in society is promoted within a context of understanding the social, economic and political barriers to participation and thereby reducing those factors, notably poverty and racism, though improving the access of whānau to goods and services), thirdly, ‘Toiora’ (delivering an understanding of the lived reality of vulnerable whānau and communities, and through this removing the opportunity for child maltreatment, and fourthly, ‘Te Mana Whakahaere’, the teaching of transformative practices through the provision of services that develop whānau knowledge, skills and attitudes.

808 Cram, above at 11.

809 Atwool, above n 52, at 197.

810 This is an exercise that does not generally occur. The Family Court often takes a robust approach to attempts by family to have contact to the permanently placed child. Funding from the Ministry of Justice (legal aid) can also be difficult. Atwool, above n 52, at 197 observes that it is important that cultural differences are addressed as the “life story of Māori children in [sic] inextricably woven with whakapapa and such work needs to be
be successfully sustained having regard to the issues of care and protection that led to the child being placed in care. A determination must then follow about how best the competing principles of maintaining strengthening a child’s relationships with his or her parents and siblings, and with whānau and hapū, can be achieved, noting the as well as allowing the child to develop a significant psychological relationship with those with whom the child has been placed. These are the issues that the caregivers of Shania must face as part of the task that they have as her caregivers.

The following chapter concerns the impact of financial constraints and corporate re-structuring on CYFS as it attempts to deliver services to those children and families with whom it is involved, discusses key inquiries and reports into the situation of children who are either in the care of the Chief Executive or have (or had) a status with CYFS. These are matters that over time impact on the ability of the Chief Executive and his social workers to undertake the task that is required in respect of children who are in care and cannot be returned to the care of their families.

The next chapter considers the legal frameworks used in New Zealand to effect permanency for children

undertaken by a person with appropriate cultural expertise...” At 215-216 Atwool recommends firstly, that care plans for Māori children include details of whānau, hapū and iwi connections, secondly, that those plans identify a nominated whānau representative (being a person other than the parents) and, thirdly, priority is placed on the location of whānau from within the whānau, hapū and iwi networks available to support the family and to offer alternative placement if necessary.
CHAPTER NINE

Legal Frameworks for Effecting Permanency

9.1 Introduction

If it is accepted that in most cases, but not necessarily all, it is de rigueur for children who have been permanently placed to have their placement secured by orders made by a Court, then it is part of the duty of the State to ensure that the best possible legal framework is put in place. The issue that arises is the nature and form of those orders. In New Zealand the primary legal framework for effecting permanency is by the making of orders under COCA for day-to-day care and guardianship in favour of those with whom the child has been placed. The Adoption Act 1955 may also be used to effect permanency, but is used on relatively rare occasions. There are issues with each regarding their effectiveness in securing a permanent placement for a child in a new family. This chapter firstly explains the legal framework and identifies the primary deficiencies with COCA in conferring legal certainty for children who have been permanently placed; secondly, it explores the issue of guardianship when orders are made under COCA appointing the new caregivers as additional guardians of the child. Lastly, it identifies issues perceived with adoption as the vehicle for permanency.

9.2 The applications that are made to effect legal permanency

When a child is permanently placed and the decision is made to have that permanency reflected in orders from the Family Court, the usual procedure is for the new parents to obtain a parenting order for day-to-day care and an order that will appoint them as guardians of the child. (The birth parents may also have a parenting order made in their favour providing for contact with the child.) Before COCA orders can be made the existing custody/guardianship orders under the CYPF Act must be discharged. Two applications must therefore be filed – for discharge of the latter orders and the application for orders under COCA. These will be joined and (usually) determined at the same hearing, as the CYPF Act proceeds on the premise that when the custody (or sole guardianship) order is discharged, the default position is that the person (or persons) who previously had day-to-day care and

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811 This was also the case prior to COCA, when the Guardianship Act 1968 was the statute governing private law relationships between adults and children.

812 Section 52 of COCA provides that where a Court proposes to make a parenting order that does not give a parent the role of providing day-to-day care, it must consider whether and how the order could and should provide for that parent to have contact to the child.
guardianship will again resume the various incidents that go to constitute the parameters of care and guardianship. On discharge of that order, the right in law to care for the child reverts to the child's birth parents, albeit for a nano-second, but is then trumped by the making of the parenting order in favour of the new parents of the child.

A similar situation occurs in respect of guardianship. Where the Chief Executive has been appointed as a sole guardian on its discharge, the guardianship status of the birth parents ceases to be suspended and comes back into full effect. Simultaneously, the caregivers will (generally) be appointed as additional guardians. On this occurring, the child will have perhaps up to four guardians, all of whom will be subject to the law relating to guardianship. Where the Chief Executive is appointed as an additional guardian, discharge of that order changes nothing in substance, save again for that same nano-second when the rights of the birth parents are untrammelled by the presence of another person who is able to exercise those rights as well.

Where the Chief Executive has been appointed as an additional guardian, in addition to having custodial status under s 101 of the Act, the birth parents always retain in law the status of guardians. They are therefore able to participate fully in exercising the incidents of guardianship, save for decisions concerning placement of the child. Section 16 of COCA needs to be considered as it prescribes three important matters concerning the exercise of guardianship. The duties imposed apply to the Chief Executive in the same way as they do to any guardian of a child, and will also apply to the new caregivers when they are appointed as additional guardians. Thus during the times when the Chief Executive had custody, but was appointed as an additional guardian, and following the making of COCA orders in favour of the new caregivers, the permanently placed child may now have in all probability at least

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813 This reflects the objects and principles of the Act which look to children who are the subject of intervention being returned to the care of their family if it is appropriate to do so. See ss 109 and 118 which provide that when an order for custody or guardianship expires order is discharged, custody and guardianship revert to the person who had custody or guardianship immediately before the order was made.

814 See section 114 (2) (a). As a reminder, note that where an order for sole guardianship has been made that has the effect of an order for custody of the child is if an order had been made under s 101.

815 This is made clear by the definition of ‘guardianship’ in s 2 of the CYPF Act where it is given the same meaning as is given to it by s 15 of COCA, and noting that the parameters of guardianship is prescribed by s 16 of COCA. See the discussion in Part Five and the next paragraphs of this chapter.

816 Save as is excluded by the operation of ss 101 and 104 of the Act. This primarily relates to placement decisions. See the discussion later in this chapter.
three or four guardians.\textsuperscript{817} The duties and responsibilities attaching to guardianship apply with full force to each of those guardians.

Thus under s 16(3) a “guardian of a child may exercise (or continue to exercise) the duties, powers, rights and responsibilities of a guardian … whether or not the child lives with the guardian, unless a Court order provides otherwise”.\textsuperscript{818} Thus, even though a child is in the custody of the Chief Executive and placed in care or has been placed with permanent caregivers who have taken orders under COCA, including appointment as additional guardians, the birth parents’ status as guardians continues and they too must be consulted and be involved in decision-making on guardianship matters. There are, however, issues with this that need to be discussed.

Firstly, there is an issue about the powers of the Chief Executive under a custody order, and noting here the effect of ss 101, 104 and 105 of the Act, to place a child if the placement would affect the child’s relationship with his or her parents. This occurs because the child’s place of residence is an incident of guardianship, and thus outside of the parameters of the s 101 order. The decision of the Family Court in \textit{JJHW v Chief Executive of the Ministry of Social Development} \textsuperscript{819} is cited as authority for this proposition.\textsuperscript{820} This held that a s 101 order did not provide authority for the Chief Executive to relocate a child from Raglan to Christchurch. The Chief Executive had custodial status only and was not appointed as a guardian. The Court considered whether or not it had jurisdiction to impose a condition relating to the placement of the child and concluded that it did not.\textsuperscript{820A} There was jurisdiction to prevent the move of the child as it involved a matter of guardianship. However, there is, on close analysis, doubt as to the correctness of this decision. It is

\begin{itemize}
\item \textsuperscript{817} The new birth parents and the birth mother and usually, but not always birth father as he may not have guardianship status, either because he is not on the birth certificate (s 18 of COCA) or was not living with the mother at time during the period beginning with conception through to birth. (s 17 of COCA)
\item \textsuperscript{818} Section 16(3) of COCA. The precise parameters of what s 16(3) in means is not at all clear. If it is saying that the Court can place limits on the exercise of guardianship by a guardian, or prevent a guardian from exercising one or more of the incidents of guardianship it should say that is the effect. COCA does authorise the deprivation of guardianship in certain situations. This is a power that is rarely used, as the significance of deprivation is perceived as profound. It would be surprising therefore, in the absence of a more explicit statutory reference to see s 16(3) used to limit or otherwise qualify the extent to which a non-custodial parent is able to exercise the incidents of guardianship.
\item \textsuperscript{819} Above n 449. See [78], [79] and [85]. This case held that a s 101 order did not provide authority for the Chief Executive to relocate a child from Raglan to Christchurch.
\item \textsuperscript{820} Al-Alawi, above n 514, at paragraph NT10.
\item \textsuperscript{820A} See the discussion at paragraphs [58] to [63]. This centered on the extent to which it could be argued that the decision of the Court of Appeal in \textit{LC v Ministry of Social Development}, above n 449, which found that in certain circumstances a condition attaching to placement could attach to a s78 order.
\end{itemize}
necessary to examine certain earlier cases touching upon the placement of children by the Chief Executive away from their families. In the case of *In the Matter of AHRJ* the Court had to examine the ability in law of the Chief Executive to move a child from Christchurch to the North Island.\textsuperscript{820B} The Chief Executive argued this could be done in reliance on the powers embraced by the s 101 custody order, and did not involve a matter of guardianship. The Chief Executive in that instance was also appointed as an additional guardian. The Court accepted that it could not impose a condition as to placement. However, it was held that the broad powers relating to placement were not available in an instance involving relocation, which involved guardianship. This particular finding was later overruled by the High Court in *Chief Executive v TK*.\textsuperscript{821} This found that in a case otherwise involving relocation of a child, that firstly, the consent of the child’s guardians was not required and secondly, that the Family Court had no power to impose a condition as to placement on a custody order.\textsuperscript{821A} As to the former, it was held that the custody order was an order that fell within the ambit of s 16(3) of COCA. As noted above, this provides that a “guardian of a child may exercise (or continue to exercise) the duties, powers, rights and responsibilities of a guardian … unless a Court order provides otherwise.”\textsuperscript{821B} The fact of there being a custody order under the Act brought into play the proviso to s 16(3) resulting in the rights of guardianship relating to placement being subordinate to the power of the Chief Executive to place. The scheme of the Act was to vest placement decisions exclusively with the Chief Executive.

The decision in *Chief Executive v TK* was subsequently partly overruled by the Court of Appeal in *L C v Ministry of Social Development*,\textsuperscript{822} on a different point, relating to whether a

\textsuperscript{820B} *In the Matter of AHRJ* [2007] NZFLR 49. The question of whether the Chief Executive could place the child is case was decided on the basis

\textsuperscript{821} *Chief Executive of Child, Youth and Famil Services v TK* [2007] NZFLR 12; (2006) 26 FRNZ 87. The case involved an order under s 78 of the Act as opposed to an order made under s 101. For present purposes the difference is irrelevant. See also the earlier case of *Chief Executive of Child Youth and Family Services v The Family Court at Christchurch* (2000) 19 FRNZ 280 was to the same effect as *Chief Executive of Child, Youth and Famil Services v TK*, with the latter approving the former.

\textsuperscript{821A} At paragraph [69].

\textsuperscript{821B} Emphasis added.

\textsuperscript{822} Above, n. 449. The Court of Appeal said that the High Court in *Chief Executive of Child Youth and Family Services v The Family Court at Christchurch*, had by looking at the power of the Chief Executive to place a child in a residence established under s 364 of the CYPF Act and then proceeding on the basis that it gave a relatively unfettered discretion and therefore placed restrictions on the operation of s 78(3) was wrong. This provision says that an interim custody order can be made subject to any conditions, and without that provision being otherwise unrestricted. This, said the Court of Appeal, was to reason backwards. See [55]. In respect of the decision in *TK*, the High Court had erred in holding there held that the scheme of the Act was to vest placement decisions exclusively with the Chief Executive. Conditions attaching to placement could be made at the time of the first call of a case when the question of placement is to be considered.
s 78 custody order could be the subject of a condition relating to placement. The Court of Appeal did not address the question of the consequences of a custody order being made under the Act and how that impinges on guardianship rights. The finding of the High Court in the Chief Executive of Child, Youth and Family Services v TK case on this point, therefore, (arguably) remains good law and, accordingly, the Chief Executive has exclusive jurisdiction over placement of a child irrespective of whether that involves what would otherwise be a relocation of the child as that is understood in private law. On this analysis the decision in JJHW v Chief Executive of the Ministry of Social Development was wrongly decided as the judge, although addressing s 16 of COCA by reference to subsections (2)b) and (5), did not address the effect of subsection (3) which goes to the nub of the argument in Chief Executive of Child, Youth and Family Services v TK.  

It also, of course, captures a parenting order granting the new caregivers day-to-day care. However, in private law under COCA a child’s place of residence involves the exercise of guardianship. Thus should a caregiver of a permanently placed child later want to change the place of residence, that involves an incident of guardianship and the birth parents, as guardians, must be consulted and give their consent. Secondly, whenever either (or both of) the Chief Executive and the new caregivers are appointed as additional guardians (with the birth parents and primarily under the Act but also under COCA) then the exercise of that power is caught by s 16(5) - the duty on the part of all guardians "to act jointly (in particular by consulting wherever practicable with the aim of securing agreement) with any other ..."

823 This is a complex issue. The Family Court can attach a condition as to placement only at the time of the making of the first s 78 interim custody (or if a without notice order is made, at the first call of the case. See LC v Chief Executive, above. Once a declaration has been made and the Court sanctions the making of a s 101 order in favour of the Chief Executive the policy of the statute is such that the Chief Executive has almost an unfettered discretion about placement, a process recognising the respective responsibilities of the judiciary and the executive. It is my view that this analysis is incorrect and that the Court can impose conditions as to placement at the time a s 101 order is also first made. See Allan Cooke “CYFS Orders: Not really a licence to place children” (2013) 14(3) Family Law Advocate 16.

823A See the judgment at paragraphs [69] – [71].

824 See s 16(2)(b) of COCA, if it affects the child’s relationship with its parents and guardians. It would seem that a move from one house to the house next door would not involve a matter of guardianship. It would not impact on the relationship the child has with its parents. If the move involved a change of school, then a guardianship arises. But see s 105(b)(ii): the Chief Executive when exercising powers conferred by s 101 may through the case social worker arrange for any child “to be placed in any school or other institution that provides care or training or physical or mental health care.” This is often said to authorise social workers to remove a child from one school and enrol him or her in another. It is a debatable proposition.

825 For example, if the birth parents see the child from time-to-time, and whether in accordance with an order or by agreement, and the caregivers intend to move from Auckland to Sydney and to enrol the child in a Buddhist boarding school.
guardians of the child.” Thirdly, there is no requirement to consult in respect of matters of day-to-day care living arrangements where one guardian has the right of day-to-day care. 826

9.3 Issues arising

As noted, in a permanency case, the caregivers of the child will make two primary applications: under the Act for discharge of the existing orders and under COCA for a parenting order for day-to-day care 827 and to be appointed as additional guardians under s 27. There are three problems that immediately arise from the application of this legal framework 828 and which have their origin in the conceptual basis that underlies COCA. 829

Firstly, there is a lack of certainty with COCA orders as they can be subject to challenge in respect of day-to-day care, contact and guardianship and, secondly, the obligation that arises through the duty to consult and make joint decisions from having been appointed as additional guardians; the third issue is contact for children who have been permanently placed in new families – which falls outside the ambit of this thesis. However, the references noted in the footnote below will enable the reader to delve further into the issues posed by contact issues in permanent placements. 830

826 As the custody order made under the Act confers on the Chief Executive the sole right to determine day-to-day care, any other guardian cannot engage in guardianship discussions on those matters. Similarly, once COCA orders are made, the matters involved in day-to-day parenting are the sole preserve of the new parents.

827 And subject to any further order of the Court that may be made.


829 As with its predecessor, the Guardianship Act 1968. The current reforms to the Care of Children Act may make things easier for caregivers but this will an incidental outcome of the reforms.

830 See Allan Cooke, above n 34; Atwood and Gunn, above, for recent discussions on this issue within the New Zealand context; D Macaskill Safe Contact: children in permanent care and contact with their birth relatives (Russell House Publishing, Dorset, 2002); Stephanie Taplin Is All Contact Between Children In Care and Their Birth Parents ‘Good Contact’? (Centre for Parenting & Research, NSW Department of Community Services, Ashfield, NSW); A v Ministry of Social Development [2009] NZLR 625 where the High Court noted at paras [57] – [58] that when a child is in a permanent placement, the purpose of contact with biological parents is so that the child can understand her background and identity. It is not to develop a relationship with the child that will ultimately lead to return. See also Chapter eight and the brief discussion there on this point.
9.3.1 The Care of Children Act - problems

COCA, as private law, is primarily intended to regulate the arrangements for children when their parents cannot agree on matters of day-to-day care and guardianship, usually following separation.\(^{831}\) Care arrangements for children whose parents have separated may be prescribed by agreement or order; these may necessitate change and, where parents cannot agree on the nature of that change, recourse to the Family Court may be required. Inglis argued in respect of private law disputes between parents over children that, as a matter of principle, access to the Family Court must always be available, subject to any statutory or other limitations that may be imposed.\(^{832}\) The contrast with children, (and notably permanently placed children), can immediately be seen.\(^{833}\) Ready access to the Court to resolve disputes reflects dual philosophical perspectives: first that the State has a legitimate role in assisting families in resolving disputes involving families and children, and second, that issues surrounding children are predictive, to be contrasted with civil or criminal proceedings where Courts make determinations over events that have occurred and where liability can directly be sheeted home.

Although COCA was not specifically designed to pay attention to securing the future of children who have been permanently placed in new families, it nonetheless provides a convenient legislative framework for such children. This is notwithstanding the three issues noted above. That it has succeeded in doing so to date is, at best serendipitous. The apparent success of the COCA framework has meant that the fundamental and underlying concepts have not had to be addressed in terms of public policy.\(^{834}\) This is a reality that is sometimes,

\(^{831}\) See s 3 of COCA. It is also there to provide for the international enforcement of domestic orders relating to children, to implement the Hague Convention on the Civil Aspects of International Child abduction, to acknowledge the role that other family members play in relation to children, to respect the views of children and to recognise their right to consent or not to medical procedures. See also the observation in \(E v G\) [2008] NZFLR 337 at [25] as to the distinction between the Act and COCA: the former is a public statute to ensure the protection of children who are at risk (care and protection) and the latter is private law mainly concerned with appointment and disputes between parents and guardians, including day-to-day care and contact.

\(^{832}\) Inglis does not further discuss or define what these statutory or other limitations are. (See below in respect of the existing statutory grounds, ss 140 and 141 of COCA.) Presumably, given Inglis’ emphasis on the protective role of the Family Court, this would not involve significant restriction on entry to the Court brought about as a consequence of a political/philosophical perspective that ignores expert advice and has an inadequate data/research basis that justifies the changes being made. However, the changes to the Family Court being wrought by the 2013 amendments to COCA and to the Family Courts Act 1980 will bring about this result. The intended restrictions do not seem to be directed specifically at birth parents of permanently placed children, but may be an unintended consequence.

\(^{833}\) Inglis, above n 183, at 520.

\(^{834}\) The only ‘debate’ that has occurred has been the report of the Law Commission on Adoption, see n 565. There was a suggestion of at least the start of a policy discussion in the Consultation Paper Reviewing the
but rarely, recognised by the Family Court when, instead of COCA orders being made in a permanency case, either the Court makes orders which circumscribe the guardianship powers of the birth parents or make an order for adoption. Had there been any considered intention by Parliament for COCA to be the specific instrument for effecting permanency then it might be presumed that the pitfalls identified for new families by the COCA framework would have been embodied when the statute was enacted, as they had also been present under the former Guardianship Act regime.

9.3.2 The lack of certainty with COCA orders for day-to-day care

Orders made for day-to-day care under COCA cannot provide objective substantive security to the child and his new family. This is because the orders are susceptible to challenge as of right by anyone who is an eligible person as set out in s 47(1)(a)-(c) of that Act. They

Family Court, above, n 100 (Ministry of Justice, Wellington, 20 September 2012) something might have to be done about securing greater certainty for permanently placed children. This observed that changes might be required to the Act and review of services orders in case where those had been made to support permanently placed children. The resulting draft bill was silent on the point. See also Chapter Thirteen and the discussion concerning the Vulnerable Children Bill.

835 See for example In the matter of the M children FC Papakura, CYPF 055-4-6/96 21/98, 6 August 2002; LC v LMT and SGT FC Nelson, FAM 2007—042-000492, 4 April 2008.

836 See for example Re application by W [adoption] [2002] NZFLR 913, (2002) 22 FRNZ 217. This involved a successful application to adopt a child. The Court was satisfied that on the facts of the particular case, the failure of COCA to effect certainty for the child in terms of a legally secure placement could only be remedied by the making of an adoption order. The birth parents of both suffered from severe mental illness. The child was removed at the age of 5 weeks and ultimately placed with the applicants for adoption. The birth parents were aware of their limitations as parents. However, they took an active interest in child and exercised regular contact. The child developed an attachment disorder and it was recommended that the parental contact stop, at least temporarily. The birth parents sadly accepted this as being necessary. The caregivers subsequently applied to adopt. They argued the child needed the permanence of his current foster placement recognised and that adoption was the only certain way of doing this. The application for adoption was opposed by the birth parents and by CYFS. The application was granted. The Family Court accepted that the child needed to be given a sense of permanency and belonging which additional guardianship alone could provide, given the particular outlooks and priorities of the adoptive parents. It was plain from evidence that it would have been seriously disadvantageous to the child if the placement was shaken or broken. Therefore, adoption should be granted. The order was to be final and not interim because the child had been well established in the caregiver’s household for 3 years. Adoption was to be preferred to additional guardianship because the legal structure of adoption, while always an artifice, is less artificial than any other structure. The child needed to have a sense of permanency and belonging which additional guardianship alone could not provide, given the particular outlooks and priorities of these adopting parents, as the cost of the litigation on them was too high given their commitment to this very vulnerable child.

837 See the discussion in Chapter Eleven. See also Cooke, above n 34; Triseliotis, above n 515; Biehal and others Belonging and Permanence: Outcomes in long-term foster care and adoption (BAAF, London, 2010). The authors note that disruption rates for children in foster care (28% had left their index foster parents after placements lasting three or more compare unfavourably with those for adopted children. (This of course reflects issues arising from the placement itself and not necessarily being indicative of foster care placements falling down through legal challenge by birth parents.

838 This includes any person who is either a parent of the child, a guardian of the child, or by any person who is a spouse or a partner of a parent of the child. The expression ‘or a partner of a parent of the child’ includes a step-
are able to make an application as of right to the Family Court for day-to-day care, for and in respect of contact, and should there be a dispute between guardians. The fact that the birth mother or father may no longer be providing actual care to the child does not mean that they can no longer be described as a ‘parent’ for the purpose of the section. They will generally continue to be guardians. This status accords standing to make an application. An eligible person has an automatic right to make an application. Further, a person who is a member of the child’s family, whānau or other culturally recognised family group are also eligible persons, but may only make application for a parenting order for day-to-day care or contact if granted leave by the Family Court to do so.  

Stability in and certainty of placement are seen by all commentators as prerequisites for a successful permanent placement. Where it is necessary to achieve this through the making of orders from the Family Court, a statute that confers an automatic right of access to the Family Court to challenge an order for day-to-day care of a permanently placed child prima facie fails in achieving those desired objectives. Taplin refers to Best who argues that:  

Where contact is being discussed within care and protection law, then, at some stage the child welfare agency will have decided that the risk of harm to the child is sufficient to justify State intervention in the court will have made a determination that the child is in need of care and protection. Those people seeking contact are also the same people who have been unable to fit adequately care for and protect the child. Unlike cases in private law where the child may (in some cases) no longer be able to live with both parents because of the parents’ incompatibility, in public law the child is no (longer) living with their parents because of their (parents) inability to properly care for the child. Where the decision has been made to remove the child until the child is 18 years, the court has made a decision that on the evidence before it, this parental and capacity is unlikely to  

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839 The fact of leave having to be granted immediately poses a barrier to be overcome. The essence of leave being obtained is to prevent vexatious, unjustified or possibly vindictive applications being made. For the law on obtaining leave see Tito v Tito [1980] 2 NZLR 257 (CA).

840 For example, see Hannon, Wood and Bazelgette, above n 514; Mark Henaghan “The rights of Children when Decisions are Made About and Which Affect the Welfare and Interests of Children” in The Family Court Ten years On (New Zealand Law Society, Wellington, 1991) 48.

841 R Best “Contact between a child and their family following care and proceedings” (paper presented to the 28th International Congress on Law and Mental Health, Sydney, 2003) 14, in Taplin above, 947, at 5. This quote was in respect of an application for access to the child. However, the same point is of wider application and would cover a dispute between guardians. Many caregivers feel frustrated at having a legal duty to consult and make joint decisions with birth parents.
improve. While accepting that different factors will be relevant in determining contact as distinct from allocating parental responsibility, there must still be a qualitative difference to considerations of contact and public law is contrasted with private law proceedings because of the determination that parents cannot care and protect child.

That quote is, on its face, an attractive proposition: Why should abusive and neglectful parents be able to make application to the Court for return of the child or over a matter of guardianship (or to exercise contact with) the child who is the victim of these acts of commission and omission that have had such dramatic consequences? A concern expressed here is that continued contact with abusive families, by provoking dormant painful feelings, may pull children back into the past as opposed to letting them move forward. The concept is of stronger application in respect of parents who are seeking the return of their permanently placed child or who want to argue a matter of guardianship that may have arisen.

9.4 Available Remedies

When COCA was enacted the Parliamentarians did not turn their mind to its implications for the permanently placed child and their need for stability and security. It is necessary, should there be a challenge by a birth parent to a permanent placement, to look at ss 140 and 141 of COCA that allow the Court to dismiss or to restrict the commencement of proceedings in prescribed instances.

Section 140 prescribes the power of the Court to dismiss proceedings relating to a specific child if satisfied that continuation of these is:

… in the particular circumstances, clearly contrary to the welfare and best interests of the child … or that the proceedings are frivolous or vexatious or an abuse of the procedure of the Court.

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842 Macaskill, above n 947, at 4, citing G. Smith “Do Children have a Right to Leave their Pasts Behind Them?” in H Argent (ed) See You soon: Contact with Children Looked After by Local Authorities (BAAF, London, 1995). (Smith, who worked with children who had been sexually abused and who had suffered the impact of trauma and abuse, argued that these children have the right to form healthy new attachments.) See also Nicola Atwool, above n 725; Atwool and Gunn, above n 509, at 33; Cooke, above n 33.

843 See also the more general powers set out in rules 193 and 194 of the Family Court Rules 2002. Rule 193 conveys a power to stay or dismiss proceedings that are vexatious, frivolous, or an abuse of the Court’s process. Rule 193 is of less importance as it empowers the Court to strike out “all or part of an application… or other pleading where it discloses no reasonable basis for the application, is likely to cause prejudice, embarrassment, or delay in the proceedings; or is otherwise an abuse of the Court’s process. The context to the exercise of these powers must of course relate to the welfare principle. (Inglis, above n 183, at 522)
Ordinarily, the act of preventing an applicant from pursuing proceedings and having the merits of a case determined is significant. As access to the Court is being denied, a high threshold is set before s 140 can be invoked, the Court being satisfied that the continuation of the proceedings is ‘clearly contrary to the best interests of the child.’ 844 In a typical private law case involving separated parents, as opposed to a birth parent seeking the return of a permanently placed child, the implications can immediately be seen. Should there be a dispute over the care or guardianship of a child, then the Court is there to provide the remedy. 845

Section 141 can be used to prevent COCA proceedings being commenced. Within the orthodox paradigm of COCA these are powers that must be exercised with some degree of prudence given the right to natural justice enshrined in s 27 of the New Zealand Bill of Rights Act 1990. 846 The section declares that the power can be exercised “if and only if, the court is satisfied that a person has persistently instituted vexatious proceedings” (under COCA). This is irrespective of whether the proceedings were in respect of the same person or persons or matter or matters. The Court is required to give the person whose future access to the Court may be circumscribed the opportunity to be heard. 847 The remedy provided on a successful application is the power of the Court to order that future proceedings may be commenced only with leave of the Court. 848

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844 See for example G v L (2007) 26 FRNZ 418; BAM v AJG [2011] NZFLR 352; DBH and GHK v JCK North Shore, FAM 2007 – 044- 773, 29 August 2011. Also relevant in this respect is the current debate about the operation of the Family Court (commencing 2011 with the proposed reforms to the operation of the Family Court). Are the resources of the Court being appropriately used by those who come to it for assistance? The argument is that much of the litigation is unnecessary and/or trivial and/or being driven by misguided adult dynamics. See for example, RAW v CMR North Shore, FAM 2006-044-1250, 28 November 2011, where the 5 year old child had been the subject of 22 substantive applications to the Family Court.

845 Inglis, above n 183, at 523.


847 It can be noted that s 140 is silent in this respect but it is accepted that the same duty applies. See D v H [2000] 2 NZLR 242 (HC).

848 For an instance of cases prior to COCA where the Family Court has purported to place barriers on an applicant’s access to the Court and been rebuffed, see for example D v H, above n 848, an appeal against a decision of the Family Court to prevent father from filing applications for 2 years. It was held that the power to prevent access to the Court was unusual, needed extraordinary circumstances, and an appropriate evidential basis. The party whose access to the Court is to be restricted must have the opportunity to be heard and there must be an abuse of the court arising from the specific application intended to be made. See Langman v Langman (custody: jurisdiction) [1998] NZFLR 925, (1998) 17 FRNZ 466 where the High Court set aside a condition to an order absolutely prohibiting future applications.
There have been a number of cases that have considered the use of s 141. A recent instance, and one where the Court helpfully summarises what is required to be established to succeed on such an application, is the decision of BSK v A-MW. At paragraph [39] the following matters were noted as being the relevant factors:

… the welfare and best interests of the child; the purpose of COCA – to promote the welfare of children and to facilitate their development by ensuring there are appropriate arrangements in place for their care and guardianship; the nature of the proceedings; the nature, frequency and timing of the applications brought by the applicant; the merits of the application.

On the other hand, it is also necessary to address the natural justice issues identified by the Court in S v T where the Court referred to the far-reaching implications of the section and observed that its “intrusion into rights of natural justice … breaches the fundamental constitutional rule that every citizen has a right of recourse to the legal system. There must be very good grounds for it.”

Whilst it is possible to invoke either ss 140 and/or 141 in a case of a permanently placed child and to succeed in having the originating application stayed or struck out, there remains a two-fold problem. Firstly, there is no immediate barrier to an eligible person filing proceedings. Secondly, the filing and serving of proceedings will result in the new family unit being immersed in the proceedings. In most cases of permanency where the Family Court has already sanctioned the removal of the child from its birth family, it could quite reasonably be thought that any subsequent proceedings filed by the birth parents simply could not be commenced. This is not the case.

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850 BSK v A-MW FC Hamilton FAM-2007-019-588, 13 July 2011. This was a case where the respondent had made three unsuccessful applications for a warrant to enforce a parenting order. The applicant also refused to return text messages to the applicant, something which made co-operation between the two as parents and guardians impossible.

851 S v T (2008) 27 FRNZ 31 at [32].

852 And in doing so found that the child is in need of care and protection and made a declaration to that effect.

853 Inglis, above n 183, at 526, recognises the issues arising for those facing proceedings which involve vexatious litigants under other branches of the Family Court’s jurisdiction and where there are proceedings under COCA. It is interesting that whilst reference is made to other statutes such as the Child Support Act 1991,
That second consequence is actual involvement in proceedings. Irrespective of the path followed in defending the matter – whether by recourse to ss 140 or 141 and, then if necessary, to defending the case on a substantive basis - this may disturb the equilibrium of the new family unit and undermine the security of the placement. To the extent that ss 140 or 141 can be used to defeat applications filed by birth parents in cases of permanency is fortuitous and serendipitous. However, the extent to which the Court will be able to ensure that the new family is not unnecessarily placed under undue stress is uncertain.\footnote{This writer can attest to the anxiety of some parents of permanently placed children in being confronted with applications by birth parents (or in proceeding to hearing on an application to discharge orders under the Act and for the making of COCA orders. In one instance the caregiver applicants decided at the last minute prior to a hearing not to proceed with their applications. The consequence was that the child continued to have a status under the Act. In \textit{JJHW v Chief Executive of Ministry of Social Development}, above n 450, reference was made at [11] to the caregivers discontinuing their substantive proceedings for orders under COCA because “the contact arrangements for [E]… are so unstable and fraught that at this stage, we consider it premature to apply to discharge the current order in favour of the Chief Executive …”} This is a reality recognised by the Family Court. It was a factor in the decision in \textit{Re the P children} not to discharge orders on the application of caregivers of two children and to substitute those with orders under the Guardianship Act. At paragraph [30] of the judgment, the judge commented:\footnote{\textit{Re the P children} FC Manukau, FP 048/345/00, 19 December 2000. There were 2 sets of applicants: each had care of a sibling from the same birth family. This writer was counsel for the applicant caregivers. Discharging the order for the additional guardianship of the Chief Executive would have meant that the parents could reassert their rights as natural guardians, and this could have destabilised the children's placement. It would also have meant that the names of the caregivers would have become available to the parents, and this too carried the potential that the parents would destabilise the placements. The judge went half-way: orders were made placing the children in the custody of their respective caregivers under s101 of the Act and keeping the Chief Executive involved as an additional guardian.}

\begin{quote}
[30] Ms P’s evidence was of grave concern to me – she was clear that she intended to bring further applications concerning the children and that she had no comprehension of why the children had been removed from her care and/or could not be returned to her. The history of this file shows that Mr and Mrs P have challenged at every opportunity any orders made by this Court implementing plans that the children live other than with them.
\end{quote}

Similarly, the case of \textit{CYPF 45/96} is pertinent. The Court commented on the need for the Chief Executive to work in effecting a successful transition for the child in going between his caregiver and his grandmother (with whom he spent holiday time) to address the latter’s
“carping criticism” which had led the caregiver to reconsider “her commitment to J.”856 In G v Ministry of Social Development,857 the Court refused to discharge a custody order under the CYPF Act in favour of the Chief Executive given two competing applications for discharge - one by the child’s maternal grandmother and the other by her former social worker. The child was aged six years at the date of the judgment and had a significant care and protection and care history with a number of unsuccessful whānau placements. She exhibited challenging behaviour. In CYF v JFM a child was in the custody of the Chief Executive and placed with the maternal great-aunt and great-uncle with whom the child was accepted as being attached.858 The mother lived in Wellington but was unable to provide care to the child. The father, who was only identified late in the piece as being the father, lived in Auckland. In E v G the Court noted that the risk of de-stabilisation of an existing placement by aggrieved parents or birth family could raise concerns that might lead the Court to the view that orders under the Act should not be discharged:859

One should not replace one care and protection need with another. It is not unusual…to see situations where …removal of children has occurred and they find themselves in a stable, and safe environment with caregivers only to find that, where there is no buffer between those caregivers and the family group, the placement is destabilised commonly through access arrangements.

Two other cases can be noted. The first is MEM v SBN 860 where a mother sought discharge of orders under the Act in respect of a 14 year old boy who had been the subject of litigation in the Family Court, the High Court and the Court of Appeal. The Court refused the mother’s applications. The judge was satisfied that if discharge occurred, there would continue to be significant care and protection issues for the boy in his mother’s care. These included her lack of insight into the original care and protection concerns, her lack of understanding as to his emotional needs in respect of his relationship with his father, the mother’s actions in

856 FC Porirua, CYPF 45/96, 13 December 2000 at [30].
858 CYF v JFM [2005] NZFLR 905. The great aunt and uncle were referred to almost throughout the judgment as the “foster parents”. This was a case where there was no psychological report. The Court thought it not necessary.
859 E v G [2008] NZFLR 337 at [31].
860 MEM v SBN FC Rotorua, FAM 2001-019-000230, 22 June 2009. The child had been in the custody of the Chief Executive since July 2002 and was living with his father’s partner, father being in prison for sexual offending against a teenage girl. Father’s imprisonment was the catalyst to the application by mother for discharge of the orders and return of her son to her care. There had been little contact between mother and son since 2001 and as at the date of the hearing, no contact at all.
dealing with the boy’s school and her “determined opposition” to the placement with step-mother that was part of her campaign of undermining the placement. Secondly, *Ministry of Social Development v C-P F* was a case where the Court made orders confirming, by the making of COCA orders, the permanent placement of a two and a half year old who had lived with her caregivers since birth. The Court noted the lack of ultimate certainty with COCA orders.  

[41] Further, there is the reality that permanency is but a word. The provisions contained within both the Care of Children Act and the … Act dictating that the best interests and the welfare of a child must be the Court’s paramount consideration do not rule out some change in the future subsequent to a decision for permanency for some, as yet unforeseen reason. That said, once a plan for permanency is accepted, the Court will be loathed [sic] to interfere with that other than for reasons of serious risk.

9.5 The guardianship dilemma

The second issue is that arising from the duty on the part of the new parents once appointed as guardians to consult with and make joint decisions with the birth parents on matters constituting guardianship. As noted, s 16 (3) of COCA makes it clear that a guardian of a child may exercise, and continue to exercise, the incidents of guardianship in relation to their child, whether or not the child lives with the guardian, unless a Court order provides otherwise. All guardianship decisions relating to the now permanently placed child must be made by each of the guardians jointly, with there generally being up to four guardians. Where there is an absence of consultation in respect of guardianship matters or where decisions are made unilaterally, the aggrieved party may file application under s 44 of COCA with the Family Court for a decision on that guardianship dispute.

This is a fundamental matter for the newly constituted family as guardianship issues arise as a matter of course through the life of the permanently placed child. Thus decisions such as whether to vaccinate the child, which school the child will attend, the ability to travel overseas or to relocate are all matters that involve guardianship and require consultation and joint decision-making. This outcome is one that many caregivers struggle with, finding it difficult to comprehend why, once COCA orders are made, they are required to consult and

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make joint decisions on matters of guardianship. On occasions this perception arises because of the message conveyed by the Chief Executive that getting orders in respect of the child is akin to adoption – with the implication that consultation is not required.\textsuperscript{862} The questions that caregivers ask can be summarised as: ‘why should we have to consult with these birth parents who have seen their child taken away by the State and placed with us? Haven’t they lost the right to be involved in making decisions for their children who are now permanently placed with us?’\textsuperscript{863}

Three cases, \textit{In the matter of the M children} \textsuperscript{864} \textit{Re the P children} \textsuperscript{865} and \textit{Re an Application by W [adoption]} \textsuperscript{866} illustrate the issues that arise in attempting to resolve the parameters of guardianship. The first two are cases under the Guardianship Act where I was acting for the caregivers. It was my practice when the Guardianship Act was in force, and when acting for caregivers of permanently placed children, to apply for and obtain orders for guardianship that differentiated between the birth parents and caregivers.\textsuperscript{867} This was to specifically

\textsuperscript{862} An assertion based on personal experience of representing caregivers over many years. Note again the observation noted above from R Best, above n 842. Two precise examples can be given, one somewhat historical and the other more contemporary. The former involves publications from the former Permanent Placement Unit in Auckland which referred to the effect of orders being obtained by caregivers under the guardianship Act as being akin to adoption. See Rita Derrick, above n 828; Rita Derrick, \textit{Care of Children Act and Permanent Placement}. The latter is indicated by the statement of the Minister as reported in The New Zealand Herald “Help to make Foster Care Permanent” \textit{The New Zealand Herald} (online edition, Auckland, 26 August 2010) \texttt{<http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10665444>}. The report contrasted adoption and guardianship and conveyed the impression that with the implementation of the Home for Life policy as from 1 October 2010, the issues of challenges to permanency, and concerns about the loss of support would be met by the new package. “Adoption involves birth parents signing over legal guardianship of their child, but the Home for Life scheme will put neglected children into the permanent care of foster parents, who will get a state assistance package.” The reality that the Chief Executive ignores the guardianship rights of the birth parents is illustrated by the decision of Judge Adams in \textit{Chief Executive v CM}, above n 483. The issue here concerned the actions of the Chief Executive in instituting counselling for a child in a situation where the Chief Executive only had a s 78 custody order. This was a decision that was more properly characterised as one of guardianship. However, see the discussion in Inglis, above n 183, at chapter 19.9.1 “Guardianship” (Section 110) and “Custody” (section 101) Orders,” at 663, where a more benign perspective is taken of the distinction in the Act between guardianship and custody. “It follows from this analysis that for the purposes of the care and protection provisions of the 1989 Act any attempt at a strict demarcation between guardianship and custody functions can be less than helpful.” This is simply wrong.

\textsuperscript{863} Some caregivers are in fact quite relaxed about these obligations – as they are with contact and the need to ensure the child has a knowledge of who it is and where it has come from. It is my view that caregivers with these characteristics are best able to provide a stable and permanent home for the child.

\textsuperscript{864} Above n 836.

\textsuperscript{865} Above n 856.


\textsuperscript{867} Since the passing of COCA my practice generally is to advise clients to be robust and just proceed to make the decisions that must be made and to then deal with any fall out. This reflects the unpleasant pragmatic reality that in the majority of cases this can be done with relative impunity.
circumvent the rigours of appointment as additional guardians in terms of consultation and joint decision-making if compliance with the law occurred – as it should. In the matter of the M children saw the Court making the orders sought, but refusing to do so in Re the P children. In the former case, at paragraph [15], the judge stated that “there is jurisdiction to make orders defining areas between guardians under ss 8 and ss 13.” An application had been filed to deprive the birth parents of their guardianship. The judge refused to do so, but accepted that an order for guardianship could be made under which the caregivers were appointed guardians generally and then for specific purposes giving them the right to make decisions on most matters of guardianship without first consulting and obtaining the consent of the birth parents. Where such decisions were taken by the caregivers, there was an obligation to advise the birthparents of them “as soon as practicable after the decisions were made” and in terms of the obligation to consult this was limited to their “making all reasonable endeavours to consult as are appropriate in the circumstances.” In coming to this decision the judge opined at paragraph 14:

I agree that it could cause trouble for children and adults alike if we pretended that, for each child, there would be four equal guardians. To do so is unrealistic and will set Mr and Mrs M, the parents, for disappointment which could be the cause of further trouble for everyone. The parents will have limited access; access has been an area of concern; the caregivers will, inevitably make most of the decisions. Mr and Mrs M should remain on the field of play, but as occasional players, not in the thick of the action. Their rights to be informed of important issues should be sustained, but the other guardians should have a free hand with decisions, even major decisions.

In Re the P children the caregivers sought appointment as additional guardians on precisely the same basis as the caregivers in In the matter of the M children. The judge refused to make the appointment, not being “satisfied that I have jurisdiction to follow … those courses

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865 Of the Guardianship Act 1968. The Judge relied on the reasoning in Director-General v R (1997) 16 FRNZ 357. In that case the Court made an order in respect of a 16 year old who had status under the Act which restricted the guardianship rights of a parent in respect of education. The judgment involved a sophisticated analysis of the relevant provisions of the CYPF Act and the Guardianship Act.

866 This writer was counsel for the caregivers. The application was based on the grounds that the birth parents had had previous children removed from their care and permanently placed. It was argued this was sufficient to constitute a grave reason necessitating deprivation of guardianship. The argument was not accepted.

870 At paragraph [23] of the judgment.

871 This case was cited with approval and followed in the 2008 decision in LMC v LMT and SGT FC Nelson, FAM 2007-042-000492, discussed below at n 881.
Lastly, in *Re an Application by W [adoption]* the application was specifically for adoption given that there were issues about the certainty of the placement and about engaging with the birth parents on guardianship issues. The order was made.

At a practical level (if not a legal one) what this fails to address is the reality for caregivers when confronted with potentially intransigent birth parents, who will often have personality disorders and will continue to litigate with no insight into the impact of this on the children nor any empathy for them. Similar orders could arguably be made under COCA by invoking s 16(3). As far as I know, this has never occurred. Some judges would be concerned with such applications being made. COCA, as presently framed, does not address this issue.

**9.6 Deprivation of guardianship**

Section 27(1) provides that the Court may appoint a person either as a sole guardian or as an additional guardian. This deceptively simple provision leads caregivers for the permanently placed child who want to be sole guardians ‘up the garden path’, implying that their appointment may be either as the only guardians or, in the alternative, in addition to the child’s existing guardians. This in fact is not the case - the appointment being as additional guardians generally. For caregivers to be appointed as sole guardians, they will have to apply under to s 29 of COCA to deprive the birth parents of their guardianship rights. This can only be made in two situations: firstly, if the parent is unwilling to perform or exercise the incidents of guardianship, or secondly, for some grave reason is unfit to be a guardian. It might be thought that the ‘grave reason’ ground for deprivation could be easily made out in a permanency case since the child has been removed from its parents and placed with a new family. A comparison with the Adoption Act and the power to dispense with consent to an

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872 In argument on submissions the judge expressed her reluctance to make the orders as sought as they would be almost akin to adoption. The judge and this writer (counsel) disagreed on the point.

873 Personal comment from Dr Suzanne Blackwell, Clinical psychologist, to the writer, 31 July 2013.

874 See page 221 above for comment on the application of the s 16(3) proviso.

875 Neither did the Guardianship Act 1968. It disappointment that the opportunity was not taken when COCA was enacted to make provision for caregivers of permanently placed children and giving them the ability to make guardianship decisions without having to consult with the birth parents.

876 Section 29(3)(a) of COCA. The order must also serve the welfare and best interests of the child. Section 29(3)(b).
adoption where the Court is satisfied that there has been a failure to exercise the duty and
care of parenthood is prima facie attractive.  

There are often difficulties in establishing a sufficient evidential basis that will satisfy the Court that an order depriving the birth parents should be made. Where the Chief Executive has previously been appointed as an additional guardian, and did not consider it necessary to seek appointment as sole guardian, it must be assumed that as a matter of both law and fact, the Chief Executive determined that his social workers and the birth parents could operate with the caregivers as a team in the welfare and best interests of the child when guardianship issues arose. Given that, it is impossible to see how the caregivers could sustain an application to deprive a birth parent of her guardianship rights. It is much easier to succeed in establishing deprivation based on the unwillingness ground in a situation where the birth parents have retained their guardianship rights, but have rebuffed or ignored legitimate opportunities to be involved in such matters. There is also a problem arising when the Chief Executive was been appointed as the sole guardian. During the period of that guardianship the birth parents have been unable, as a matter of law given that their rights are suspended and of no effect, to exercise the incidents of guardianship. In that event, it is at least superficially attractive to argue, as a positive defence to an application to deprive based on an unwillingness to exercise or perform guardianship duties that the birth parent was not allowed to be involved but was otherwise willing to do so.

In addition to the issues noted above, case law makes it plain that quite special circumstances must be established before the Court will be satisfied that the ‘grave reason’ threshold has been reached. This involves the Court finding that something profoundly serious has occurred.

9.7 Return of the permanently placed child to birthparents
There appear to no reported cases where a birth parent has been successful through a challenge in the Family Court to effect the return of their child from caregivers who have had

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877 Section 8(1)(a) of the Adoption Act 1955.
878 The assumption here is that the Chief Executive has honoured in both spirit and letter the duties of an additional guardians. The distinction in this instance between that guardianship obligation and the duty under s 8 of the CYPF Act to advise the birth parents of important decisions that have been taken in respect of the child should be noted. This duty operates where the Chief Executive exercises custodial and/or sole guardianship powers when either or both are held.
879 See for example as being indicative of the cases on this: BLB v RSC [Removal of guardian] [2013] NZFLR 25; Re D (An infant) [1971] NZLR 737 (SC); IMB v BMA (2007) 26 FRNZ 484;
COCA orders made in their favour.\textsuperscript{880} This is in contrast to those cases where birth parents have sought return of their children prior to a permanent placement being confirmed by the Court (or at the same time as the discharge hearing brought by the caregivers takes place). There are numerous examples to be found.\textsuperscript{881}

\textsuperscript{880} This view followed a search in the relevant legal publications and from inquiry of colleagues around New Zealand. One instance of continuous but unsuccessful litigation has been the \textit{LMC v LMT and SGT} case, above n 872, conducted in the Nelson Family Court. This has seen proceedings in the Family Court, the High Court and the Court of Appeal. The children’s mother who has a significant personality disorder has sought their return and/or variations to contact. The children are placed with family. However, the case that in my experience that best fits the paradigm is the series of cases that can be bundled together under the name \textit{WAF v Ministry of Social Development}, above n 666 and n 794. This saw the return of an apparently permanently placed child to birth parents. However, although the caregiver twice applied for discharge of the CYPF Act orders and for orders under COCA, this never occurred. The child, whose parents were of Cook Island Maori, Maori, Niuean and Pakeha heritage, had been born in after 23 weeks’ gestation to 17-year-old parents who lived in a seriously dysfunctional household. The child was taken to hospital by the family where she was found to have fractures to 7 ribs. She was placed with a Pākehā caregiver. The Chief Executive after initially supporting the placement (duration and attachment) then sought return of the child to her mother. The Court was assisted by the work of a psychologist who prepared 7 reports throughout the litigation. Mother also filed applications for discharge of the CYPF Act orders. The ostensible permanent placement caregiver, WAF, filed applications for discharge of the CYPF Act orders which were determined by the 2010 judgment; the applications were dismissed but the placement continued. Judge Boshier had significant issues with the cultural chasm that existed for the child in that placement and considered it appropriate to see if the birth mother could effect change. The child was securely attached to the caregiver but also had a lesser, but still secure, attachment to both birth mother and birth father. Directed intervention was implemented to see if those changes could be made. This involved significant attachment therapy. The caregiver filed an appeal. This was not proceeded with. Further applications were filed later that year and came before the Court in 2011. On this occasion the Court was clear that the child had to be returned and gave directions for the transition to occur around the time of the child starting school and subject to mother participating in a supported living environment. The return was effected. The child’s contact with WAF continued on a regular basis. This came to a head in the 2013 judgment. The Chief Executive and mother wanted contact terminated; WAF wanted alternate weekends. Contact was set in accordance with a schedule which over 2013 – 2015 is to reduce in frequency to 3 visits in each year. The Court noted that this was a case that did not fit at easily into either the COCA or CYPF frameworks [at [17] – “traditional models”] given its particular facts, accepting the advice of the highly Court appointed psychologist in this respect.

\textsuperscript{881} See for example, \textit{Deacon-Sarsfield FC Auckland, FAM 2007-004-001634}, 10 August 2009; \textit{In the Matter of the Four K-G children FC Auckland, FAM 2006-005-002470}, 25 February 2010, where some of the 7 children who had been removed were returned, before the birth parents situation imploded and removal again occurred. I acted for the birth parents in this case; \textit{Ministry of Social Development v NC and BB FC Porirua, FAM 2010-091-000364}, 15 July 2011; \textit{S v P} [2001] NZFLR 251; 20 FRNZ 19. The latter was a case where the birth mother successfully sought return of her child. A report from a psychologist opposed that; the Chief Executive, however, supported return. The foster mother, who had understood the placement to be a permanent one, opposed that course. The Court had regard to literature which challenged the apparent success of long-term fostering. The case was criticised by the authors of Brookers who assert it:

"provides another example of the failure to focus on this child in this situation. Instead, the focus in this case was on the ideal of a child being raised by her mother and on recognising the mother’s efforts to achieve an adequate parenting capacity so that her child might be returned. The 3-year-old child had been in care since the age of 10 months because of her mother's inability to cope. The child was very securely attached to the foster mother and the foster mother's child. Despite having been in the care of her mother for 3 days out of 7 for some time, the child had only an insecure attachment with the mother. The s 178 reporter, who had assessed the mother and child and observed the mother's inability to interact positively and appropriately with the child, recommended that the child remain in the long-term care of the foster mother. The reporter gave a reasoned opinion as to why the risk of breakdown in the foster placement was very low. However, Judge McAloon
Where the child has been placed with intended permanent caregivers the fact that the birth parents are allowed one ‘final shot’ at opposing that permanent placement and getting the children back is highly disruptive to all involved. These cases are indicative of the problem given that the child is with new parents at the time of the hearing and the same dynamics may well then apply. For example, in the litigation involving a child ‘Ella’, proceedings were conducted from 2000 when the Chief Executive removed the child from the care of her mother through to 2011 when orders were made in favour of the caregivers with whom the child had been placed (for the previous seven years and then aged 12 years of age). Numerous related proceedings occurred across the Court spectrum. A defended hearing took place on 1 December 2003 when a declaration was made and the child was placed in CYFS custody for the purpose of a long-term permanent placement being found. A further defended hearing took place a year later on the mother’s application for discharge of the orders. This was unsuccessful, as were subsequent appeals to the High Court and Court of Appeal. The case returned to the Family Court when the mother filed a further application for discharge in October 2006; directions to get the case to hearing were given on 30 October 2007. Barnardos on 6 March 2008 filed an application for strike out for want of prosecution. There were then further proceedings in the High Court when the mother unsuccessfully sought to have counsel for child and counsel for Barnardos removed and an unsuccessful application for judicial review of the actions of the Chief Executive (CYFS) before final orders under COCA were finally made in favour of the caregivers in 2011.

accepted the evidence of the mother's partisan expert (which was based on generalised research findings rather than application to the particular facts) that there was a one in three chance of breakdown of long term foster placements. Consequently the Judge ordered a gradual return of the child to the mother. No consideration appears to have been given to the risks of abuse involved when a distressed and resistant child is returned to a vulnerable parent who has strived for the return for a number of years.” Zainab Al-Alawi (ed) *Brookers Family Law — Child Law* (online looseleaf ed) above n 511.

882 Chief Executive v Gibb FC Auckland, CYPF 004-39-D/00.
883 HC Auckland CIV -2005-404-424, 24 November 2005. This writer became involved in the litigation at this stage when instructed to act for Barnardos of New Zealand who by then had both custodial and guardianship status.
884 CA31/06, 17 July 2006.
885 The Chief Executive of Barnardos had by this time assumed custodial and guardianship powers.
886 Chief Executive v RIG FAM 2000-004-000451, 8 July 2008.
887 G v Chief Executive and G v Chief Executive (no 2) CIV 2008-404-4975, 6 May and 11 June 2009.
889 FAM 2000-004-451, FAM 2011-004-000049, 15 March 2011. The caregivers were not prepared to file applications for COCA orders until the mother’s litigation had concluded. The judge had managed the case in the Family Court since 2006, commented at paragraph [10] on the process that had been followed by the birth mother in pursuing her application and which led to his earlier decision to strike out the application for return as
The final matter to note is the fact that many birth parents of permanently placed children simply either give up once the Court makes orders in favour of the new family. Many of them will be relying on legal aid to fund the cost of the intended proceedings and when they cannot obtain legal aid funding they are unable to proceed. This is not necessarily a ‘bad’ thing in that such prolonged litigation merely serves to disrupt the child’s placement and opportunity for permanency, as the Shanaia case study shows. This assertion is based on my experience as a family lawyer over many years working in this area in three capacities: – as lawyer for children, as lawyer for the new caregivers and as lawyer for birth parents. However, the pragmatic reality facing birth parents is not a substitute for having a conceptually sound and principled framework in place. The reality that underpins COCA orders for day-to-day care is that, unlike adoption, they are not final or permanent as a matter of law and do not, of themselves, provide sufficient security for the permanently placed child.

9.8 Adoption

The Adoption Act 1955 brings about a legal framework that provides certainty of placement for those who are the subjects of orders under that Act. This arises by virtue of the ‘statutory guillotine’ effect of the Adoption Act: on the making of an order the child is deemed, as a matter of law, to be the child of the adoptive parents and the legal relationship between the child and its birth parents is severed - the child “ceases to be the child of his existing parents.” Further, adoptions are almost irrevocable and an order once is made it is

follows: “Unfortunately Ms G, either through legal advice or a range of issues got herself so tied up in interlocutory issues and trying to deal with the proceedings that considerable delay took place. Such that, in my view, the window of opportunity for the issue to be re-opened passed and it was no longer appropriate in the welfare and best interests of this child for that issue to be re-opened any further. She had become so old and settled in her current circumstances that it was inappropriate for her to be exposed to further litigation…”

890 Legal aid funding for birth parents to take proceedings to file new applications to have children returned to their care will be very difficult if not impossible to get. See s 10 of the Legal Services Act 2011. The statutory criteria is quite prescribed and even if financial eligibility is not an issue, the discretionary powers conferred on the Commissioner is such that in the absence of quite compelling evidence as to (a) change on the part of the applicants and (b) an otherwise “favourable” fact situation – for example, unsuccessful “permanent” placements for the child that can be evidenced and the birth parents maintaining a relationship with the child despite the fact of separation when the child was in care.

891 Department of Health, above n 829; Law Commission, above n 565; Triseliotis, above n 517.

892 For the definitive record of adoption in New Zealand See Griffiths NZ Adoption History & Practice, Social and Legal 1846 – 1996, above n 58.

893 Section 16(2)(a) and (b) of the Adoption Act 1955. See also Law Commission, above. A number of commentators address this as the fundamental objection to adoptions. (For example, see Parkinson, above n 828; Law Commission, above.) The severing of this relationship is seen as highly significant for the child in terms of maintaining, on the one hand, an idea of familial relationships and on the other, actual contact with birth and
all but ‘final’ save in quite exceptional circumstances. For that reason adoption is seen in some jurisdictions as being the most effective way of achieving permanency for children in the permanent care of the State.

The Law Commission identifies 8 essential issues with adoption: it involves secrecy and deception which can cause serious psychological trauma to some adoptees; adoptees feeling rejected, confused or unwanted; the effect on birth parents and their families; the focus on adults and not children (no best interests test and hence a lack of compliance with article 12 of UNCROC); lack of participation rights for children; past adoption practices having a devastating impact on children and birth parents; the Adoption Act 1955 being out of date, reflecting property and contract principles and not family law principles; the ultimate outcome being a legal fiction and, being inconsistent with Maori values. But see Inglis, above n 183, who in recording the history of adoption in New Zealand records that by the late 1800s fostering was a commonplace for children who had been abandoned or neglected. There was however no certainty for the child or the fostering parent. The welfare and best interests of the child were seen within the dominant paradigm of ownership of a child by its natural parents who could at any time reclaim the child. “Seen from a modern perspective, the issue was treated as an intellectual exercise without any regard to the consequences for the child of being withdrawn from...his real family and being transferred into the care of a parent he had probably forgotten.” (At 864) Adoption, in the initial form of the New Zealand Adoption of Children Act 1881 was enacted to address that issue. Inglis, above n 183, at 865, footnote 5, observes that “[T]here is a serious message here for those whose ideology leads them to believe that adoption is no more than a fictional legal construct and that the blood-tie, in itself, should be elevated above what is in the welfare and best interests of the child: a return to the common law philosophy of the late 1880s.”

An adoption order may be varied or discharged in accordance with s 20 of the Adoption Act 1955: firstly, the prior approval of the Attorney-General is required to make the application [s 20(3)] and no order shall be discharged unless the order was made by mistake as to a material fact or in consequence to a material misrepresentation to the Court or to any person concerned [s 20(3)(a)]. Litigation is also possible where there is an application to dispense with the consent of a natural parent to the adoption. A parent whose consent has been dispensed with can apply to the High Court to revoke the decision to dispense or to revoke any interim order to adopt or a final order if either has been made within one month from the making of the order dispensing with consent. See s 8(6) and (7) of the Adoption Act 1955.

This was the outcome of the report of the White Paper on Adoption in England in 2000, above n 829, and led to the Adoption and Children Act 2002 (UK) which recommended adoption as the preferred vehicle for effecting permanency. This reflected the intention of the then Labour Government to promote the wider use of adoption in permanency cases. A critical issue identified by the White Paper was the delay involved in effecting permanency. Adoption is said to provide a greater sense of emotional security and sense of belonging for children and that “other things being equal, the ideal for children in long-term fostering who cannot return to their birth parents is to be adopted by the foster carers.” (Triseliotis, above n 515, at 30) This is subject to this being the expressed wish of older children and their carers. Triseliotis at 31 goes onto state that such adoptions [of children in care] spare children the trauma of moving. In this respect it provides a “more enduring psychosocial base in life for those who cannot live with their birth families”. Harriet Ward, Emily R Munro and Chris Dearden Babies and Young Children in Care: Life Pathways, Decision-Making and Practice (Jessica Kinglsey Publishers, London and Philadelphia, 2006). Adoption is also said to be the best long-term option (a permanent home and accompanying certainty and stability) for very young children. This is a universal issue in child permanency cases. This has implications for the children themselves in terms of not being placed in permanent families and for the State in terms of the cost of sustaining those children in care and younger children (up to age 6 or 7) were expected to be placed for adoption. See Gillian Schofield and Emma Ward Permanence in Foster Care: A Study of Care Planning and Practice in England and Wales (BAAF, London, 2008) at 180. The correlating factor of there being problems in finding adoptive placements for children aged over the age of 5 – 6 years needs to be borne in mind. Similarly, in the United States where the Adoption and Safe Families Act of 1997 Pub L No 105-89, 111 Stat 2115, and the Adoption Promotion Act of 2003 Pub L No 108-145, 117 Stat 1879, focus on the need to find adoptive homes for children aged 9 years and over where those children have been taken into care and cannot be returned to their parents.
However, notwithstanding the certainty an adoption brings for the child, adoptions are not standard practice in permanency cases in New Zealand. Adoption, in a more general sense, is also relatively rare with most current adoptions involving step-parents in a blended family.\footnote{Bennett, above n 43.} The severity of the legal consequences of an adoption meant it has lost its cachet given the changing societal attitudes towards single parenthood and the increasing availability of abortion.\footnote{Section 16 of the Adoption Act 1955. See also Law Commission, above n 565.}

In New Zealand prior to the passing of the Act in 1989, it was not unknown for the Director-General of Social Welfare to encourage the caregivers of children who were in long-term foster care to adopt those children.\footnote{See for example Re W (1988) 4 NZFLR 468. The Director-General was the equivalent to today’s Chief Executive.} However, in \textit{V v L}\footnote{V v L (1988) 4 FRNZ 48. Although the Court was likely to find that the birth parents consent to the adoption should be dispensed with under s 8 of the Adoption Act as they had either abandoned, neglected, persistently failed to maintain or persistently ill-treated the child, or had failed to exercise the normal duty of care of parenthood, given the finding that the child was in need of care and protection under the Children and Young Persons Act 174, the Court could still exercise its discretion under s 11 of the Adoption Act and not grant the adoption.} this practice was criticised and social workers began advising caregivers of legal options under the Guardianship Act. This decision in part reflected an earlier reservation expressed in 1985 by the High Court\footnote{P v P (1985) 1 FRNZ 684, per Heron J. This was a proposed step-parent adoption which was not successful on the particular facts of the case.} about the effect of an adoption order in severing the relationship between the child and its parents. In 1991 in \textit{Re Adoption 021/001/91}, Judge Inglis QC cited that latter case as authority for the proposition that:\footnote{Re Adoption 021/001/91 (1991) 7 FRNZ 427 at 428.}

\begin{quote}
The Courts in New Zealand have tended in such a situation to shy away from an adoption process which distorts existing family relationships, preferring to achieve the same basic objective by the adjustment of guardianship rights within the family.
\end{quote}

This has been the case since the introduction of the CYPF Act. Adoption was then seen, and still is, as inimical to care and protection outcomes, even if that outcome is a permanent placement outside of the family.\footnote{See the contra-discussion in Inglis, above n 183, at chapter 22.1.1 “Controversy about adoption”. It is argued that adoption needs to be seen as just another option available in the family lawyers’ toolbox when it comes to addressing the best legal framework that may be required for the particular child and its particular situation.} The effect of extinguishing relationships between a child and its parents was contrary to the then, and still prevailing, philosophy that permanency...
should be effected by orders under COCA; hence the fact that this is what occurs in the vast majority of such cases. For example, in the case of *In the Adoption of AJM*\(^{903}\) all the parties agreed to the adoption of a Maori child. There was good reason from their perspective for doing so and the order was made. In reaching that decision, the Court explored why there was a reluctance to approve adoptions in the usual course of events, and noted, after summarising a number of reported decisions, that adoption appeared to be used in situations where permanency and security were required:

[28] This aspect [permanency and security] has received particular attention in the case law and also seems to receive significant weight in decisions. Where it can be established that it is necessary for the child’s security, adoption has been granted. It seems however that in general it has required either an indication that the natural parents of the child will dispute with the guardians or interfere in some way in the raising of the child, or recognition that security for the child can be met in no other way.

[29] *In Re W* [1988] 4 NZFLR 648, at 651, Judge Inglis QC wrote of the difference between guardianship and adoption with respect to security as follows:

Under the guardianship law as it stands it is impossible to achieve that necessary degree of security in any way other than adoption. The mere adjustment of guardianship or custody rights does not in itself provide any scheme for the child’s upbringing that is necessarily permanent or necessarily secure. That is because for technical reasons those legitimately concerned with the child’s upbringing remain entitled to come to the Family Court at any time for orders or directions under the Guardianship Act, a possibility excluded by adoption. Each case must depend on its own facts and circumstances and the options are to be weighted having regard to the welfare of the child.

[30] *In the Adoption of J* [1992] NZFLR 369 Judge Inglis held that it was better for the child to see her natural family, if she wished to do so, from a secure base and in the knowledge that she could not be removed. Orders under the Guardianship Act 1991 could not be regarded as set in concrete and would provide room for the prospect of further access and review applications. Adoption created the necessary secure base.

\(^{903}\) *In the Adoption of AJM* [2005] NZFLR 529.
[31] In Application by W (adoption) [2002] NZFLR 913, Judge Moss considered an application in respect of a child who had been born to parents with serious psychiatric disorders. The natural parents recognised that they had a limited capacity to act as parents. Child, Youth and Family advocated the resolution of the proceedings through guardianship orders. Judge Moss determined that the child was a particularly vulnerable child who required a concrete legal structure that brought him permanency and belonging. Accordingly the orders for adoption were made.

[32] In contrast, in Application by P (adoption) [2001] NZFLR 673, Judge Somerville noted that despite the wish of the children and their stepmother for adoption, the children’s needs and security were already being met by a loving relationship and by the fact that their stepmother had committed herself unconditionally to them. It was not a case in which there was another guardian who could potentially interfere in the family unit and while the adoption was something that the parties wanted, it was not something that they needed or required.

[33] Due to the permanent nature of adoption, the Courts have shied away from making adoption orders unless an advantage to the child can be determined. Most often the perceived advantage is the permanency of the order where there is the potential for litigation or interference in the upbringing of the child. Where custody and guardianship orders can adequately meet the security of the child however, the Courts are less likely to make an order for adoption. This preserves the child’s rights of succession and the natural and cultural links with its family. This may be particularly important where the child is of ethnic origin. Each case has however discussed and weighed the advantages of guardianship and adoption within the context of the particular facts. No Court has chosen to espouse a general opinion of the circumstances in which adoption is to be preferred.

Further reference should be made to Re an Application by W [adoption].\(^{904}\) This case appears on its facts to be typical of a permanency case, notwithstanding that it did not involve abuse or neglect, but rather parental incapacity through mental illness. The caregivers of a permanently placed child deliberately sought adoption: the child was uplifted at five weeks of age and experienced a number of placements before being placed with the caregivers at nine

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\(^{904}\) Above n 867.
months of age. The child who suffered from an attachment disorder\textsuperscript{905} was in the custody of the Chief Executive who was also a guardian. When the child was four years of age the caregivers made an application to adopt. This was opposed by both birth parents and the Chief Executive. The Chief Executive believed that orders under the Guardianship Act were appropriate and would provide the necessary security and stability that the placement required. There was a corresponding concern about the legal effects of an adoption and the loss of legal recognition of the child’s biological relationships. The caregivers expressed significant anxiety at the prospect of future litigation – in respect of contact and at the possible input of new spouses should the birth parents separate. They were recorded as being anxious about the child’s stability with them; concern was expressed about the possibility that attachment issues would re-emerge, and they had doubts as to their stamina to cope with further legal challenge. They were nonetheless committed to the child continuing to have knowledge of and contact with his birth family. The Court dispensed with the consent of the birth parents to the adoption and made an adoption order. In doing so the judge opined that:

[54] This particularly vulnerable child requires the legal structure that will best cement that permanence of placement with… [adoptive parents]. It is plain from the evidence, both social work and psychological, that it would be seriously disadvantageous to J were that placement to be shaken or broken. It is for that reason that I consider the adoption order should be granted. Typically, an adoption order is initially an interim order. In this case, for reasons which follow, the order is to be a final order. The first reason in favour of that is that this child has been well established in the W household for 3 years. There is no need for an interim period in order to check that a child will become happily and safely established in a household. The second and more important reason is that in my view the litigation around this child must stop.

[55] The cost of the litigation on the adopting parents has been too high given their commitment to this very vulnerable child. The adoption is to be preferred to additional guardianship because, in a situation such as this, the legal structure is always an artifice but it is less artificial than any other. This child needs to have a sense of permanency and belonging which additional guardianship alone cannot provide, given the particular outlooks and priorities of these particular parents.

\textsuperscript{905} This led to the birth parents who wanted to exercise access, not doing so at the instigation of CYFS following specialist evidence that it was not in the child’s best interests given the attachment disorder.
Critical to the decision to grant the adoption was the possibility that parenting orders for day-to-day care and appointment as additional guardians would not suffice having regard to both the approach of the birth parents and that of the caregivers. This was made clear in the penultimate paragraph of the judgment:

[56] That is not an expression of acceptance of the outlooks of the adopting parents. It would be more desirable if, temperamentally, they were able to work cooperatively without assuming control. But the combination of their own style and the almost impossible degree of commitment which the last 3 years has required of them, means that it is not realistic to impose on them a legal structure which will commit them to cooperation which they fear both medium and long term. Comment needs to be made about the continuing care and protection status for this child. Should contact between J and the Hs fall below a level required for J to re-establish and maintain warm familiarity with his birth parents, then it would appear to me given that he is such a vulnerable little boy he may become in need of care and protection again.\footnote{The last sentence of the quoted paragraph is an oblique but clear message to the adoptive parents: “the adoption order has been made as you desire but you must ensure that the child maintains a relationship with his birth parents: failure to do so could lead to the re-establishment of a care and protection situation being brought about. This statement was necessary as there was no way for the Court to make an order for access/contact given the adoption order and the fictional severing of the blood and therefore the legal relationship between the child and the birth parents.}

This case can be contrasted with the litigation involving LC that involved proceedings in the Family Court, the High Court and the Court of Appeal.\footnote{C v T HC Nelson, CIV 2008-442-202, 10 December 2008; C v LT, ST, EC and AC and Ministry of Social Development [2009] NZCA 140; C v T [2009] NZFLR 385; C v T [2009] NZFLR 1098; LC v LMT FC Nelson, FAM 2007-042-492, 15 April 2010; LC v LMT FC Nelson, FAM 2007-042-492, 17 June 2010; LC v LMT FC Nelson, FAM 2007-042-492, 15 October 2010; LC v LMT [2011] NZFLR 203.} LC suffered from a significant mental illness. Her three children were removed by the Chief Executive. Two of the children were in the care of their maternal grandparents and had been effectively since their birth. The third child was in the care of a maternal aunt. Following the making of the declarations for the two children placed with their grandparents in July 2004 and April 2006, the CYPF Act orders were discharged in April 2008 and replaced by COCA orders in favour of the grandparents. Similar orders had been made in respect of the third child. Their mother had the benefit of a contact order. Subsequent litigation occurred in respect of contact at the instigation of the mother who signalled at the same time that she wanted the children back in her care. There was no suggestion of adoption being utilised and, in the circumstances of
the case that may have been the right approach. However, the consequences of the litigation on the children and the stability of the placement must have been significant.

9.9 What framework offers the better stability?
As will be more fully discussed in the next chapter which considers the permanency paradigm and considers the relevant literature, while long-term foster care can offer permanence, it often failed to do so. At the same time, adoption is not a universal panacea. Adopted children do no better than certain of the long-term foster care children. On average, both the adopted children and those in stable foster care were more likely to have mental health issues than the wider population of children, and even children who had been in very settled long-term placements with excellent parenting (and irrespective of whether they were adopted or not) showed high rates of disturbance many years after having been placed. However, the situation was worse for the children in the unstable foster care group – their emotional, relationship and behavioural difficulties were particularly serious and had contributed to placement instability. This latter group of children had entered care at a later age and therefore had a significantly greater need for the provision of on-going support, although children in all of the groups presented with issues that necessitated their being given greater levels of support than other groups of children in the community. This was so irrespective of the legal framework that was provided to the children (and with the children still experiencing (as a prerequisite) loving and stable care. However, delaying decisions in respect of either entering care or that a permanent placement is necessary, or in failure to provide ongoing supports, may result in children losing the opportunity for a stable and secure placement. These are required in order to give the children a chance of realising their full potential.

908 Biehal and others, above n 837.
909 Biehal and others. Within the group of fostered children there was a stable group who had lived with their primary foster carers for 7 or more years. There was then an unstable group who had lived with their caregivers for 3 years before the placements were disrupted. (At 258) Alan Rushton and Cherilyn Dance “The Adoption of Children from Public Care: A Prospective Study of Outcome in Adolescence” (2006) 45(7) Journal of the American Academy of Child and Adolescent Psychiatry 877-883 found that more than one third of their sample (28/76, 37%) were experiencing difficulties 6 years on from placement.
910 Biehal and others at 270 - 271.
911 Biehal and others at 270.
912 Henaghan “The rights of Children when Decisions are Made About and Which Affect the Welfare and Interests of Children” in The Family Court Ten years On, above n 840.
913 Biehal and others at 272.
9.10 Conclusion
This chapter has outlined the legal framework that operates when children are in the care of the Chief Executive, commencing with how the legal process is generally commenced by the filing of applications for discharge of the CYPF Act orders and the substitution of COCA orders for day-to-day care and guardianship. The analysis has illustrated that while there may be conceptual issues arising from the use of COCA orders to secure permanency, the reality in most instances is that this regime provides sufficient legal security insofar as placement is concerned. There are similar issues around the exercise of guardianship given the quite limited circumstances in which the natural guardianship rights of birth parents can be removed, notwithstanding that such an outcome may be necessary for the permanently placed child and his or her new family. However, these conceptual issues are profound and where birth parents seek the return of their children or who, while possibly accepting the fact of permanency, nonetheless pursue contact, this can be quite problematic for the new family. The alternative framework of adoption has been considered and although it provides certainty of placement because of the consequences of an adoption being made, that outcome has led to its not being favoured as a preferred permanency vehicle in New Zealand. The chapter concluded with a brief summary of the more detailed literature-based discussion in the next chapter about which of the COCA/Adoption Act options is the better outcome.

This chapter sets the context for the discussion in Chapter Twelve on permanency and post-permanency supports. The next chapter considers the impact of financial constraints and corporate re-structuring on CYFS as it attempts to deliver services to those children and families with whom it is involved, discusses key inquiries and reports into the situation of children who are either in the care of the Chief Executive or have (or had) a status with CYFS. These are matters that over time affect the ability of the Chief Executive and his social workers to undertake the task that is required in respect of children who are in care and cannot be returned to their families.
CHAPTER TEN

Financial Constraints, Inquiries and Restructuring: Their Influence

10.1 Introduction
This chapter considers structural factors that operate to inhibit the ability of the Chief Executive to deliver services to children in care. These are issues that, like rust, develop quietly at first before manifesting and being identified as problems to be addressed. The chapter firstly considers issues of adequacy of the financial resourcing of CYFS since the introduction of the Act and consequences of that. This leads into a discussion of re-structuring that has occurred as it plays a part in underpinning matters such as staff morale and the appropriate delivery of services to children in care. The third facet of the chapter addresses inquiries and reports that have occurred following the death or injury of children in care.

The Act was passed in 1989. Its fundamental principles require participation by families and whānau in decision-making about their children when CYFs become involved, that the primary role in caring for children lies with families, whānau, hapū and iwi and that any intervention should be the minimum possible. Those principles meshed quite congruently with the overarching political and economic reforms that were being implemented. This is an analysis that I accept.

10.2 Funding
Funding issues have been a significant issue since the inception of the Act and have been a powerful incentive in the initiatives implemented for promoting permanency for children. The highly influential 2000 report of Judge Brown, “Care and Protection is about Adult Behaviour”, accepted the analysis proffered by Duncan and Worrall that in order to consider the issues confronting CYFS it is necessary to examine the political environment in place since 1984, being the introduction in New Zealand of policies of economic liberalisation, deregulation and privatisation – ‘new right/neo-liberal policies. Duncan and

914 Sections 5(a) and (b) and 13(a)(i) and (ii). See Pauline Tapp and Nicola Taylor, above n 560, at 90.
915 Brown, above n 168.
916 This was the year when the Fourth Labour government was elected. As noted above, it embarked on a radical programme of social and economic transformation which has continued to date with successive governments irrespective of their ostensible political persuasion.
Worrall noted that the “economic and political climate…was most receptive to any cost-cutting measure and there has been a progressive lessening of State responsibility for family and child welfare.”

This saw the implementation of an economic model intended to enhance and reduce state spending. The cost of caring for children who are in custody has been a major factor in policy implementation and has been since prior to the introduction of the Act, the provision of care being the major cost centre. Family care is significantly cheaper than institutional care. The cost of children in care was and is CYFS’s “single largest economic driver.”

Funding of CYFS is significant and a powerful driver for those charged with administration of the Act. This has been the case from the start. The Public Finance Act 1989 resulted in significant and marked tension between the need to investigate notifications and keeping

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917 Grant Duncan and Jill Worrall *The Impact of Neo-Liberal Policies in New Zealand*, cited by Brown above n 168, at 12. (The full reference is not available and I have not been able to otherwise locate it.)

918 Brown, at 11, citing Grant Duncan and Jill Worrall.

919 Nicola Atwool “Attachment and Post-Intervention Decision Making for Children in Care” (1999) 6(1) Journal of Child Centred Practice 39-55. Atwool notes at 769 that following the introduction of the Act there were assumptions which “permeated all levels” of the child protection system that traditional foster placements would disappear because children in those placements would either be returned home or their caregivers would obtain orders and that the numbers of children in care would fall as long term placements out of the family would no longer be needed. These “assumptions led to a substantial reduction in the resources allocated to children in care.” See also Brown, above n 168; Ministry of Social Development *Report of the Department of Child, Youth and Family Services First Principles Baseline Review* (Ministry of Social Development, Wellington), noted that fiscal pressure was created by children spending longer time in care with CYFS having to meet the obligatory costs involved – board payments, education, clothing and health costs. Yates, above n 828, at 38 records that 82% of “special costs” go to children in care, a “huge and unwieldy expense to the Department. Ministry of Social Development and Employment, above n 725, at 3, states that it costs about $11,000 p.a. (excluding the very high cost children) to keep a child in care, though bed and board payments.

920 The 2010 briefing to the Incoming Minister noted at 19, that the cost of children in care is the largest single economic driver for CYPFS. A CYPF Senior Adviser, David Rankin, in a 2011 article, David Rankin “Meeting the needs of New Zealand children and Young People who have been abused and neglected” (2011) 37 Best Practice Journal 4-9, at 8, noted the high social costs in respect of children in care and calculated that in New Zealand the estimated additional cost to the State of meeting the life time needs of children who have been maltreated to the extent they were brought into care as being at over $750,000 per child.


922 Hughes, above, at 19, and with children with serious conduct and behaviour problems costing twice and three times as much as those without those issues.

923 The Public Finance Act 1989 was, and continues to be an essential component of Government policy. The key features of the system involved Ministers as ‘purchasers’ and departments and other agencies as ‘suppliers’. The goods and services supplied by a department to a Minister are contained in a ‘purchase agreement’. The structure implemented resembled the “arrangements and incentives of the commercial market place”. State Services Commission *New Zealand’s State Sector Reform: A Decade of Change* (State Services Commission, Wellington, 1996) at 31. Performance is measured in outputs and outcomes. Funding is predicated upon outputs which, in theory, provide a tighter rein on spending. Shaw and Eichelbaum, above n 555, at 96.
within the prescribed budget. The demands of this led to Treasury suggesting that CYFS, as
it could not manage its budget, undertake fewer investigations. 924  Brown observes that in
1991, “as a result of financial pressures,” the then Department of Welfare reviewed its
structure, and in respect of children’s services, senior social work positions were lost. 925  An
(internal) review in 1992 saw further re-structuring with focussed business groups being
established – including the setting up of CYFS as a standalone body. 926  An important
Ministerial Review was undertaken in 1992 on the operation of the Act. This was the Mason
Report. It commented on funding and resourcing in direct terms:

> It is our firm view that the CYPF Act will become inoperable if it is not adequately
funded and resourced. 927 … We believe that the limitations on resources have reduced
the CYPF Act’s focus in care and protection to that of only crisis intervention and social
services have been tied to that focus. 928

The report went on to invite the responsible Minister to “give a clear and unequivocal
commitment to resource and fund the implementation and development of the Act so that the
objects and principles described therein may be met.” 929  The Government failed to accept
that challenge, 930 save that the Minster committed $5.8 million for a competency training
programme. 931  The formal government response was to emphasise that expenditure would be
assessed along with other spending initiatives having regard to government policy and
funding constraints. 932  Cockburn later highlighted the “intense conflict between the CYPF
Act and the Public Finance Act” 933 when there was significant pressure from The Treasury;
the 1992/1993 budget had involved significant overspending; administrative overhead costs

924 Dalley, above n 311, at 361, referring to an interview conducted with the first General Manager of CYFS,
925 The Executive Senior Social Worker, responsible for the maintenance of professional standards.
926 Brown, above n 168, at 3.
927 Mason, Kirby and Wray, above n 611, at 102.
928 At 105.
929 At 107.
930 Pauline Tapp, above n 629, and observing that the “emphasis on family financial responsibility and a policy
of minimum intervention mean that in practice cases are closed prematurely, only to return in a more critical
state.”
931 Cockburn, above n 611, at 21
932 Cockburn, above, at 23.
933 At 25. Cockburn continued: “High numbers of child abuse cases requiring statutory intervention in serious
budgetary constraints cannot co-exist along without the principles and objects of the act being compromised and
the political costs for NZCYPS and the Minister of Social Welfare becoming too high.”
had been reduced but other costs had to be paid given children’s custodial status\textsuperscript{934} and managers had little option but to pay. In 1993 all managers received notice of possible disciplinary action if they overspent budgets in 1993/1994. Staff in Auckland and Wellington leaked confidential letters to the press advising of severe financial difficulties. Certain costs were placed under tighter control and managers had to redefine what was affordable.\textsuperscript{935} Tapp refers to concerns being raised at CYFS being “so under resourced that it explicitly targets its resources at the high risk end of the continuum.”\textsuperscript{936}

The Act was a cost saving measure. Despite notifications increasing, annual budget levels for CYFS decreased.\textsuperscript{937} The area of expenditure that was of most concern was that of caring for the child in care. This was because of the responsibility of the Chief Executive in fulfilling the role of a parent, reflecting the statutory obligations created by ss 101 and 104 and the need to fund the cost of caring for that child. This was explicitly recognised by the 2003 Baseline Review which noted that when the Chief Executive assumes a custodial or [sole] guardianship role “it is then expected to meet the usual costs of being a parent, such as school and medical fees, and to co-ordinate or obtain services for the child.”\textsuperscript{938} However, this was perceived as problematic as there was an expectation that CYFS would provide services going beyond its core role in respect of children and, in so doing, assume tasks that could be said to be the responsibility of health and education.\textsuperscript{939} As part of the then on-going review of CYFS, MSD reported in 2006 that CYFS caregivers were more expensive than permanent caregivers (who had taken COCA orders) as they received a more comprehensive range of supplementary assistance than the benefit system that was otherwise available.\textsuperscript{940} The philosophical approach of the Government to cut public spending and to shift the cost burden onto families led to an understandable emphasis on securing early permanency for children who are taken into care. This, however, involves a derogation of responsibility by the State.

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\textsuperscript{934} And not overlooking the obligation at law to fund outcomes of FGCs. See s 34 of the CYPF Act.

\textsuperscript{935} Such as the funding of decisions of family group conferences, payments for counselling and foster care payments. See Cockburn, above n 611, at 13.

\textsuperscript{936} Tapp, above n 629.

\textsuperscript{937} Grant Duncan and Jill Worrall (The Impact of Neo-Liberal Policies in New Zealand, 2000), cited by Brown above n 168, at 12; Cockburn, above.

\textsuperscript{938} Ministry of Social Development (Baseline Review), above n 920, at 38.

\textsuperscript{939} Ministry of Social Development, (Baseline Review). The example of children with a conduct disorder was given. Such children with this should be seen by mental health professionals, but (in 2003) that was not a priority for mental health services.

\textsuperscript{940} Ministry of Social Development and Employment, above n 725, and appendices Permanency and Whole of Government Responses to Demand Appendix 1 “Permanency” at 5.
to these children, given the facts of both intervention in and removal from families of children who have been profoundly abused/neglected and the need to address and remedy the consequences of that abuse/neglect.

The balance of the 1990s and the turn of the century saw CYFS having to sustain its statutory functions in a political landscape that had embraced the neo-liberal reform agenda, looking to family responsibility. The consequence was an organisation producing a variable quality of service that was the subject of significant disquiet in the community at large. This was confirmed by the Brown report, the 2000 Ministerial Review of CYFS, an exercise that took “place during a time when cases involving child protection, abuse and neglect have received unprecedented media prominence and greatly heightened public concerns.” Judge Brown went on to observe that the “turbulent background” of social and political reform, with the “often conflicting social political and fiscal elements coinciding, that the current perceived profile of the Department was inevitable.” The Baseline Review of 2003 in its analysis of the operation of CYFS (in its various incarnations) referred to the “persistent difficulties of staying within budget.”

A significant motivation in finding permanent homes earlier for children in care (thereby reducing the cost to the State) is to make less use of foster caregivers providing short-term transitional care for children. This, it is said, not only assists in managing the cost resources better, but also achieves better outcomes for children who do come into care. The 2006 EXG Review noted the demands on CYFS, observing that there was a need to:

… change the balance of its investment towards providing high quality investigatory and care and protection services. The goal of statutory services is to restore safety and wellbeing through high quality service provision and a focus on children remaining at home or achieving permanency as soon as possible.

941 Tapp, above n 629, at 2.
942 Brown, above n 168, at 6.
943 At 10. The Baseline Review of 2003, above n 920, set out in considerable detail the issues confronting CYFS and how a re-direction was required, leading to the introduction of the Differential Response System, diverting non-critical social work intervention to non-statutory bodies).
944 Ministry of Social Development Baseline Review, above n 920, at 14. This report recommended a re-focussing of CYFS given the costs involved. That is beyond the scope of the thesis.
945 Hughes, above n 921. The briefing paper noted there were 4,400 foster caregivers as at August 2008.
946 At 19.
947 Ministry of Social Development and Employment, above n 725, and appendices Permanency and Whole of Government Responses to Demand, at 1.
This was one of two key factors identified by the Review as being a measure of success for CYFS. In respect of increasing permanency, this would be measured by the duration of time that children spent in care. As at 2006, one third of the children in care had been there for three or more years, with the average time from entry into care to permanency being about 18 months. The identified goal, for the short-to-medium term, was to achieve permanency for those children who had been in care for three years or more and for children who were under the age of three. Both social and financial benefits would be derived from effecting permanent placements as early as possible.

In the 2008 Briefing to the Incoming Minister, the Chief Executive noted there would always be a small number of families who would require support from CYFS: however, most of the intervention/support would be provided by other agencies, with one third of CYFS funding being budgeted for those tasked to deliver services on behalf of CYFS. “Our main role is to provide care.” This was for children in two categories: those who are not safe at home and those who come to attention for offending.

Since the recognition of child abuse in the early 1960s, children have come to be removed from their homes in ever increasing numbers and placed in alternative care. In some instances children were not removed, but were maintained in the home albeit under the supervision or monitoring of social service agencies. On occasions children were discharged from care and returned home only to be abused or worse. However, as Brown noted, resourcing and funding issues necessary to support children and families were inadequate or unavailable. Societal changes also occurred from 1984 onwards that led to an increase in poverty, reduced welfare benefits, and further state withdrawal from the provision of...

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948 As at 2006 30% of children who had been investigated, were the subjects of substantiated abuse and neglect within two years. CYFS was to focus its resources on those cases requiring a statutory response and “improve access to family support services for others” and thus reducing the extent of “re-work.” (The first was in reducing the re-occurrence rate of abuse and neglect.)
949 As at 30 June 2008 there were 2319 children who had been in care for over two years. 1085 were Māori and 1052 New Zealand Pākehā. (CYYF as supplied to Tania Williams.)
950 Ministry of Social Development and Employment, above n 725, and appendices Permanency and Whole of Government Responses to Demand. As at 30 June 2012, 2053 children had been in care for over 2 years. Of this total 1056 were Māori and 841 New Zealand Pākehā. (Figures provided to Tania Williams by the Chief Executive.)
951 The differential response system. Hughes, above n 922, noted that budgeted funding for CYFS in 2008/09 was $407,028 million. Of that $122,587 million went to providers.
952 Hughes, above n 921.
953 This development can be attributed to the article CH Kempe and others “The Battered Child Syndrome” (1962) 181(1) Journal of the American Medical Association 17-24.
954 Brown, above n 168, at 2
services, including the introduction of market-rate state house rentals. Yates saw a symmetry and nexus in this: Difficulties in finding suitable kinship placements, pressures on underfunded social work services to attend adequately to the huge influx of notifications of abuse and neglect, and reports of extreme maltreatment and deaths of children known to … [CYFS] received considerable public attention.

Where children have been abused or killed in such circumstances the formal response has often been to set up a formal inquiry to identify what happened and why. The intention was to address possible system failures that may have occurred, to put in place new processes to ensure the same or similar incidents never happened again and to ensure the State was meeting, rather than failing, in its obligations to abused children. At the same time, child protection agencies had no control over the extent to which services could be called upon. Since the introduction of the Act in 1989, CYFS has operated within a political environment dominated by neo-liberal economic policies, irrespective of whether it is a Labour or National coalition government in office. This has resulted in tension between the effective delivery of a social work service to abused children and the ability to do that in a way that keeps within prescribed budgets. CYFS is not immune to the impact of larger economic forces and/or the implementation of government policy – for example, the 1991 and 2011 budgets saw significant changes implemented to enable New Zealand to survive those two global economic downturns.

10.3 Inquiries into the death and injury to children

New Zealand children, either in the care of the Chief Executive or under CYFS oversight, have unfortunately died or been seriously injured. Several inquiries have been instituted as a

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956 Yates, above, at 156; Fox Harding, above n 19, who at 1 refers to the experience in the England in this respect. (This in in the immediate context of asking when is it appropriate for the State to intervene in families, but goes through 2-5 to comment on the conflicting dynamics which arise in the area – for example, over when or not to intervene – is the family a bastion relatively immune for the power of the State to intervene unless absolutely necessary – and where what is perceived as unnecessary intervention, and those intervening, is subject to significant criticism (and the Cleveland Inquiry of 1987 [Secretary of State for Social Services, 1988] is cited as an example); and, on the other hand, where there is a desire to protect children who are found to be at risk but the State is unable for policy/financial reasons to make the necessary assistance available.
957 By way of personal example, on 11 December 2013 I attended a meeting at a CYFS office for a review meeting about a child in care of the Chief Executive and who is in a foster placement arranged through an NGO. The case social worker advised that the placement was too expensive and the child would have to be moved at the end of January 2013. There was no other rationale given. The need to move reflects budgetary constraint.
consequence of children being abused or killed. There have been a number in recent years and these have resulted in reports, the influence of which appears to have been variable. Smith noted in respect of his 2011 report into injuries sustained by a nine year old following her being returned to the care of her mother by the Chief Executive noted that he has:

… been involved in a number of Royal commissions, Commissions of Inquiry and Ministerial inquiries. Without wanting in any way to detract from the significance of those Inquiries, none, in my view, can have been as important and significant as this Inquiry. It is a sad commentary that here in New Zealand we have witnessed far too many cases of child abuse. In recent times there have been several high profile cases, some resulting in death and others, in serious injury.

These inquiries and their subsequent reports are of importance and of great public interest at the time of their publication because they involve tragedies suffered by children, with politicians, the media and the public asking why does it happen and what can be done to stop it. The question then is the nature of the Government response to those reports and whether it is one of substance or of rhetoric, and the extent to which these inquiries have influenced or changed the way in which the State sees its responsibilities to children in its care. It has been said that “Scandals always seem to help speed child welfare reforms” reflecting the apparent need to be seen to be doing something. However, pessimism might be appropriate, notwithstanding the statements and subsequent handwringing accompanying the publication of these reports, given the numbers of inquiries that have taken place over many years and the

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958 These reports have looked into incidents involving children who either had a then current formal status with CYFS or where CYFS had been previously involved but were not at the time of the precipitating incident. See for example Jennifer Pilalis, Sharon Opai, and Tanielu Mamea Dangerous situations: Inquiry into the death of baby C (Department of Social Welfare, Wellington, 1998). (This child had been returned to her mother’s care under supervision of a social worker.); Office of the Commissioner for Children The Report into the death of Riri-O-Te-Rangi (James) Whakaruru, (Office of the Commissioner for Children, Wellington, 2000); Office of the Commissioner for Children Report into the deaths of Olympia and Saliel Aplin (Office of the Commissioner for Children, Wellington, 2003). (Neither of the Aplin girls had a formal status with CYFS at the time of their deaths. However, CYFS was closely involved with the family, having been monitored by CYFS “nearly all of their lives” at 16; Mel Smith An inquiry into serious abuse of a nine year old girl and other matters relating to the welfare and, safety protection of children in New Zealand: Report to the Honourable Paula Bennett, Minister for Social Development and Employment (Ministry of Social Development, Wellington, 2011).

959 Connelly, above n 571, at 89 suggests that the death of Baby C in 1986 helped speed reform. Tapp and Taylor observe that the subsequent report led to changes in administrative and practice guidelines for DSW social workers, it had little impact on the shape of the CYPF Act when introduced. The Mason Report resulted in 104 recommendations of which only a limited number were implemented

960 Mel Smith, above, at 4.

961 At 4.

962 Marie Connelly, above n 571, at 89.
continuing abuse of children. For example, the Dangerous Situations report in 1988 involved Baby C, a toddler who died while under the supervision of the then Department of Social Welfare. This report identified weaknesses in training of social workers. The department had not taken primary responsibility for ensuring that there had been a full assessment of Baby C’s situation. There were 34 recommendations made. Yet Mason reported that only five to six of those recommendations had been implemented, thus suggesting a departmental reluctance or inability to give “child abuse the high priority it deserves.”

Other cases involving the death of children occurred throughout the 1990s with some of the children having or had a status with CYFS. In 1989 there was an inquiry into alleged sexual abuse of children at ward 24, Christchurch Hospital. In 1991 Delcelia Witika died of injuries sustained through her having been grossly physically and also sexually abused, “living amidst a rising tide of unimaginable violence”. Her mother and her de facto partner were found guilty of manslaughter. Delcelia had been left to die alone on a mattress in an empty house. Delcelia had not been the subject of notifications to CYFS. In November 1992 the father of Craig Manukau aged 11 kicked his son to death. Craig was the subject of CYFS intervention, which was inadequate (as was the subsequent internal CYFS review of the case which was itself subject to an inquiry by the Commissioner for Children). The responsible case social worker had been ‘captured’ by the family’s standards, had an inadequate knowledge of both the dynamics of abuse and neglect and of the responsibilities cast by the Act. In 1992/1993, there was the instance of the alleged abuse of children at the Christchurch Civic Crèche which led to significant controversy in part due to the role of CYFs in investigating and interviewing the children who had made allegations against a worker at the crèche and who had been sentenced to imprisonment. In April 1999 James

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963 Pilalis Opai, and Mamea, above n 958. This child had been returned to her mother’s care under supervision of a social worker. Despite that oversight (and further reports) she was killed, with her mother being sentenced to a three year term of imprisonment. A supervision order under the Children and Young Persons Act 1974 has its modern equivalent in the support order under the 1989 Act. A “complaint”, the initiating procedure being the then equivalent of the application for declaration under the CYPF Act had been made on the basis of the child having been physically abused. The child was returned to her mother. There were subsequent instances of physical abuse whilst the child was under supervision before she was killed after a further assault (with a weapon) by her mother.

964 Dalley, above n 311, at 352.

965 Mason, Kirby and Wray, above n 611, at 14.

966 Dalley, above n 311, at 359

967 At 359. (Dalley emphasises the words quoted, but does not reference them.)

968 Tapp and Taylor, above n 560, at 116.

969 Tapp, above n 629.
Whakaruru aged four years, died after prolonged physical assault from his step-father. In June 1996 a notification was made to the Chief Executive who failed to carry out the necessary investigation and recommended to his maternal grandparents that they apply for an order under the Guardianship Act. This occurred and private law was used to address the care and protection issue.\textsuperscript{970} Subsequent processes followed in the Family Court and these resulted in James’ mother being granted custody of him. James continued to come to notice of agencies but no referral was made to the Chief Executive before his death.\textsuperscript{971} The Chief Executive, along with the Police and the health sector all failed James because of poor communication. In 2001 and Olympia and Saliel Aplin (11 and 12 years old) were murdered by their step-father. There were violence issues in the home and it was alleged that Olympia had been sexually abused by her step-father. Again the Chief Executive had been involved and again, the subsequent inquiry found that there had been inadequate social work undertaken by the Chief Executive. A number of other children have been killed in New Zealand and many of these have been well publicised in the media.\textsuperscript{972} Despite not all of these children being known to the Chief Executive, the public concern that results is often centred on CYFS as many of the children, it is thought, should have been protected by the Chief Executive, reflecting the, at times, contradictory perception held by the public. However, only 19 per cent of child homicide cases between 1996 and 2000 involved children known to

\begin{itemize}
  \item \textsuperscript{970} Commissioner for Children “Report into the Death of James Whakaruru: Executive Summary”, above n 959, Appendix Five to Brown report, above n 168.
  \item \textsuperscript{971} The report identifies that James had been seen by at least 40 health professionals, and with some of these attendances being as a result suffering non-accidental injury.
  \item \textsuperscript{972} Between 2000 and December 2011, the following children have been killed: Lillybing (2000); Hoana Rose Matiu (2000); Sade Trembath (2000); Coral-Ellen Burrows (2003) and Chris and Cru Kahui (2006) (Tapp and Taylor, above n 560, at 119.) Others since 2006 have included: Nia Glassie, 3 years of age, brain injuries after a lifetime of horrific abuse (August 2007); Tahani Mahomed, 11 weeks, severe head injuries (January 2008); Kash McKinnon, 3 years, head injuries (August 2009); Hail-Sage McClutchie, 22 months, serious head injuries. (September 2009); Cezar Taylor, 6 months, shaking and a blow to the head. (July 2010); Sahara Baker-Koro, 6 years, found dead in her bed after an alleged sexual assault (December 2010); Mikara Reti, 5 months, severe blunt-force blow to his liver (January 2011); Serenity Scott, 5 months old, severe, non-accidental brain injuries, (April 2011); Baby Afoa, 1 week, found buried in a makeshift grave (June 2011); James "JJ" Lawrence, 2, blunt-force trauma to abdomen so severe an internal organ split in half (November 2011). Anna Lesak “NZ’s ‘shocking’ child abuse record” The New Zealand Herald (online edition, Auckland, 10 December 2011) <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10772163>.
\end{itemize}
the Chief Executive. In none of these cases did the Chief Executive have a formal status.

Continuing public and governmental dissatisfaction with the performance of CYFS led to its formal review. The Care and Protection EXG Review noted Cabinet had directed two reviews of the care and protection system. The EXG Review observed that demand for CYFS intervention had increased particularly through notifications of domestic violence from the Police. This had continued to place pressure on CYFS. These notifications were investigated by social workers with 75 per cent not requiring statutory invention. However, a consequence was the pressure placed on CYFS to “undertake more intensive work with the children and families who need care and protection services.” The Brief prepared in 2010 for the Incoming Minister advised that in 2007/08 there were 98,890 notifications as at 30 June 2008, an increase of 31 per cent over the preceding year. There was also a 27 per cent increase in domestic violence notifications coming from the Police. In 2010 notifications, which include those from the Police involving domestic violence had risen to 125,000 and by 2013, the figure was said to be 150,000.

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973 Connolly and Doolan, above n 726, at 88. A total of 47 children were killed. Of these 9 were known to CYFS. Of that total, 6 were Māori and 3 Pākehā.
974 At 99. Each case appears, on the analysis by Connelly and Doolan to have extenuating circumstances. As at least two involved cases that were the subject of critical comment by the Commissioner for Children, some caution might be necessary in accepting the analysis as to those circumstances, although it is acknowledged that in one case where CYFS recommended private law intervention, a public law response would have been more appropriate.
975 The Treasury, Care and Protection EXG Review, above n 725, appendix 1 “Permanency”.
976 Hughes, above n 921.
977 The statistics indicated that of 1000 cases investigated and found not needing further investigation 74% were re-notifications. Care and Protection EXG Review, above n 725.
978 Hon Ruth Dyson, Associate Minister for Social Development and Employment Care and Protection EXG Reviews: Whole of Government Responses to Demand and Permanency (paper to Cabinet Committee on Government Expenditure and Administration, Wellington, 2003) at 1.
979 Hughes, above.
980 Bennett, above n 43, at 5.
981 Hughes, above n 921. Advice was given that in the year ending June 2011, there were 150, 747 notifications, including family violence referrals. In March 2013 the Children’s Commissioner told the Social Services Select Committee that “the bulk of the 150,000 referrals made last year from health and police were for children who were witness to domestic violence… That leads to social workers being overwhelmed. The intervention needs to be a domestic violence intervention for most of those children and in fact notifying Child, Youth and Family puts a barrier in the way. It actually delays that, usually it’s women, that woman getting assistance that she needs.” Radio New Zealand News “Select committee hears CYF getting too many referrals” Radio New Zealand News (28 March 2013) <http://www.radionz.co.nz/news/political/131429/select-committee-hears-cyf-getting-too-many-referrals>. However, in Bennett, above n 43, at 10, it is stated that 30% of the notifications in 2009/10 resulted in no further action. However, there is now some confusion as to the actual number of notifications made as it was reported in the New Zealand Herald on 24 November 2013 that due to a computer glitch, notifications made may have been unreported by as much as 8%. Kathryn Powley and Keith Ng “CYF bungles
The inquiries that have reviewed the way CYFS operates, and enquired into why children have been killed during their involvement with CYFS, also highlight deficiencies in practice by social workers which have at their root institutional and corporate failure, a reality formally accepted in the 2003 Baseline Review (report to the Ministers of Finance and Social Development and Employment) that acknowledged that CYFS was a:982

...department that was struggling to manage a complex set of services within its appropriations. The problems we identified are deep and systemic and about much more than just levels of resourcing.

The quantity of work faced by the department led to a focus on management of critical incidents, as opposed to good quality social work, which emphasised on-going case management. That review identified that CYFS having an “overly broad set of strategic directions and unclear outcome priorities”983 and that there needed to be a change of focus on the safety and security of children as opposed to their general wellbeing.984 In 2006 about 50 per cent of cases investigated identified ‘need’ but only half again of those were serious enough to necessitate statutory intervention.985 By the time of the 2010 Briefing to the Incoming Minister, CYFS was described as a department “experiencing a number of challenges – both for the outcomes of children…we work with and for the way we operate as an organisation.”986 In 2012, the White Paper for Vulnerable Children referred to this history of child death and injury, observing that:987

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982 Ministry of Social Development, (Baseline Review) above n 920, at 2. Emphasis in original.
983 Ministry of Social Development, (Baseline Review) At 2.
984 This has seen the introduction of the ‘Differential Response’ whereby social work intervention in families who are in chronic situations of low level neglect (or physical abuse) are supported by community agencies and NGOs. The initiative was “designed to increase the response options to reports of child abuse, neglect and insecurity of care”. See The Department of the Treasury, Care and Protection EXG Review Sustainability of the Care and Protection System: Whole of Government Responses to Demand (Cabinet Paper prepared for the Cabinet Committee on Government expenditure and Administration, Wellington, 2006) at 3. This saw the number of cases requiring formal statutory intervention diminishing and assistance to families in need being provided by other government and NGO providers. This is now manifested in the permanency area by CYFS delegating to contracted NGOs the task of supporting families who have taken on the task of caring for permanently placed children, with that support being time limited to 3 years.
985 Ministry of Social Development and Employment, above n 725, and appendices Permanency and Whole of Government Responses to Demand, at 3.
986 Hughes, above n 921.
Many of the issues reflect, in part, fragmented approaches to service planning, and associated funding and contracting of services. New Zealand’s current child, family and whānau support services have developed incrementally and in an ad hoc way. They do not function as a cohesive, co-ordinated system that is focussed on getting the best outcomes for vulnerable children, families and whānau.

Inquiries in New Zealand,988 and in the similar overseas jurisdictions of England989 and Australia,990 have looked at the operation of the relevant child protection statute by the agency responsible for its administration. This has concerned generic institutional failure by the agency, or a specific incident concerning a child who is in its care or where that agency has had recent involvement with the child and its family. These reports have often highlighted the vulnerability of children who have been removed from their birth families, placed in the care of social service agencies, and subsequently placed in permanent in out-of-home care. A common theme is the failure of those who have assumed ‘responsibility’ for those children to provide for their safe care.991 Then there are other reports detailing the deaths of children who have had oversight or some involvement with social service agencies.992 What emerges is the acknowledgement that these children who have been placed with social service agencies following removal from their parents, and subsequently placed in care, are amongst the most vulnerable of children.993 They have well-documented issues that must be addressed, being likely to have suffered significant neglect and/or physical and/or sexual abuse, and may well present with attachment disorders; perform poorly at school and have mental health and related issues.994 If that is their legacy, the likelihood is that they will also present with emotional and psychological problems or that these may be manifested at

988 And noting in this respect, in addition to those referred to in the opening paragraph to this chapter, the following: Review of the Children Young Persons and Their Families Act 1989, The Report of the Ministerial Review team to the Minister of Social Welfare (The Mason Report), Care and Protection is About Adult Behaviour, The Ministerial Review of the Department of Child Youth and Family Services, MJA Brown Care and Protection is About Adult Behaviour: The Ministerial Review of the Department of Child, Youth and Family Services: Report to the Minister of Social; Services and Employment, above n 168; Nicola Atwool Children in Care: A report into the quality of services provided to children in care, above n 52.
990 Brouwer above n 520.
991 Used here both in the sense of the agency that has assumed legal responsibility for the child and the person(s) who have provided actual physical care.
992 See Connelly, above n 571; Connolly and Doolan, above n 726.
993 Brouwer, above n 520, at 10; Ministry of Social Development and Employment, above n 725, and appendices Permanency and Whole of Government Responses to Demand.
994 Brouwer above.
some later time. These reports highlight common themes: there may be inadequate screening selection of caregivers, including kin caregivers;\textsuperscript{995} inadequate liaison/communication between agencies (Police, social workers/schools);\textsuperscript{996} inadequate reporting systems, which are important because children in care have need for substantial assistance (and with these must be to be appropriately identified);\textsuperscript{997} and with the same levels of support not provided to kin caregivers as opposed to non-kin caregivers.\textsuperscript{998}

\textbf{10.4 Re-structuring}

A related aspect involves the re-structuring of CYFS that has taken place. There has been macro-change ranging from branding (change of name) through to shifts from a stand-alone department of state to mergers within the MSD as a division.\textsuperscript{999} There has been internal re-structuring.\textsuperscript{1000} There have also been ‘micro’ changes including internal rearrangement with certain sites being closed in the larger metropolitan areas. Auckland is a good example of the premise that a degree of centralisation will produce greater efficiencies. Later reflection has seen that philosophy reversed and local sites again opened.\textsuperscript{1001} This results in inevitable staff and management change. In an organisation which is under pressure by virtue of the very nature of its work and with a high turnover of staff, this impacts on the ability of the agency to carry out its statutory tasks. This process of re-structuring diverts both the agency and individuals who are charged with delivering services from focusing on the core task in hand.\textsuperscript{1002} This process was described as providing “an opportunity for greater direct support from other MSD service lines for Child Youth and Family to do its core business well, and to

\textsuperscript{995} At 11; Mel Smith, above n 958.
\textsuperscript{996} Brouwer at 12; Mel Smith, above.
\textsuperscript{997} Brouwer at 12 and 18.
\textsuperscript{998} Ministry of Social Development and Employment, above n 725, and appendices \textit{Permanency} and \textit{Whole of Government Responses to Demand}, Appendix 1, “Permanency” at 4.
\textsuperscript{999} See for example the Ministry of Social Development \textit{Baseline Review}, above n 920, at 14.
\textsuperscript{1000} Paula Tyler \textit{Briefing to the Incoming Minister} (Department of Child, Youth and Family, Wellington, October 2005) with that process intended to mean that a “whole of organisation focus is taken on service delivery and the way services are delivered to our clients” at 6.
\textsuperscript{1001} The writer’s experience is with Auckland. For example, in Auckland in the early 1990’s there were site offices at Auckland, New Lynn, Henderson (Waitakere), Takapuna, Royal Oak, Panmure, Mangere, Otahuhu, Manurewa, Papakura and Pukekohe. During one period of re-structuring the offices at New Lynn, Panmure, Mangere, and Pukekohe were closed. In 2008-09 Panmure, Mangere and Pukekohe were re-opened. There were also new offices opened after 2000 as well. These included Westgate and Clendon. The need for these offices was symptomatic of the growth of Auckland and the perceived social needs of those communities.
\textsuperscript{1002} Dalley, above n 311, at 352 made the same observation in respect of the situation in 1987 at the time of the death of Baby C (noted previously in this chapter). “Child protection workers were uncertain of their status as the Department restructured and refocused its work.”
leverage off MSD’s social sector leadership to engage with other agencies.”

Judge Brown, in his report sagely observed that the: 

…turbulence of numerous restructurings [and their logic] may have been apparent at the time, the frequency of such changes has undoubtedly had a detrimental effect on the stability and confidence of the workforce and possibly shaken public confidence in the organisation.

10.5 Conclusion

The reality of funding constraints within the context of an increasing number of notifications, the injuring and killing of children in the care of the Chief Executive, and regular restructuring of the organisation all inhibit the ability of the Chief Executive to deliver services responsibly. The funding issue must therefore be seen within the context of two structural paradigms: firstly, that child protection is an on-demand service but must operate within specific budgetary constraints, creating inevitable tension as the more children who are placed in care the greater the expense for the State, and secondly, that the Act (and its administration) is an exemplar of that new-right economic paradigm of cost saving, the retreat of the State and the transfer of costs to families and to the community.

The failures identified by those inquiries cover the totality of the operation of CYFS – from the initial investigation through to the safety of children in the care of CYFS (including CYFS approved caregivers). When the organisation charged with the task of protecting children fails to the extent identified, the consequences for the children who are its focus are clearly profound. If CYFS has been, and remains, as dysfunctional as these reports suggest - and noting here the very recent Smith Report of 2011 – it suggests a corporate/governance malaise. If so, what is to be done to ensure that the needs of children in care the legal care of the Chief Executive and within the purview of its statutory umbrella are met? At its essence this embraces the notion of ‘responsibility’ – what is owed to these children and how this is effectively delivered?

The next chapter discusses permanency and permanency planning. It examines the permanency policies of the Chief Executive, noting the 2006 permanency policy, which

1003 Ministry of Social Development and Employment, above n 725, and appendices Permanency and Whole of Government Responses to Demand, at 2.

1004 Brown, above n 168, at 22.
proffered a broad range of supports to caregivers, had a very limited lifespan because of concerns around its cost. This led to its substitution by the Home for Life Policy which, despite the rhetoric that accompanied its introduction, is far more limited in the provision of support for permanently placed children and their caregivers.
CHAPTER ELEVEN

Permanency and Permanency Planning

The quality of family life matters for all children, and children who grow up in foster care need the very best care that can be offered.

11.1 Introduction

This chapter is concerned with permanency. In the orthodox paradigm, this involves the Chief Executive finding a safe and loving new home for those children where they will be nurtured through to their becoming independent adults. The opening quotation identifies with precision the expectation about the outcomes for children in the care of the Chief Executive and who cannot be returned home. Brown, in the New Zealand context, has said that the minimum requirement when a child is removed from his or her family and placed in a new family is that any such placement will be safer and less traumatic. This expectation is unfortunately expressed. It conveys almost a forlorn wish that the new permanent home will not be as unsafe as the one from the child was removed. Similarly, the proposition that the first order of business for child welfare is, at the bare minimum, to do no harm, and at best, enhance the lives of children and their families is as equally an abject aspiration. Rather, children must be found a permanent home in which the very best care will be provided, noting that there is more to this than simply the provision of a permanent home, albeit that the latter is fundamental to the process. Rather, the child’s healthy development must be promoted so that he or she can, as an adult make an appropriate contribution to family life and to society. To achieve this requires attention being paid to three dimensions, firstly, the creation of positive and secure familial relationships for these children through the application of attachment theory, secondly, the resilience of the child, and

1005 Schofield and Beek, above n 515, at 1.
1006 This can also include an institution in some limited range of cases, and for older children, effecting their transition to independence.
1007 Brown, above n 168, at 70.
1009 See Brouwer, above n 520, at 138 and Barth, above n 31, at 139.
1010 Nicola Atwool, above n 729, at 315 observes that there is a danger that “we rely too heavily on the evidence that children can achieve positive outcomes in the face of adversity without fully understanding what enables
thirdly, the subjective notion of permanence on the part of the child i.e. does this new family placement feel like one which offers family membership into adult life – the notion of belonging being accompanied by security.\textsuperscript{1011} Others observe that there are: \textsuperscript{1012}

\ldots four abiding themes … children need permanence, (the lasting experience of a family that gives them the opportunity to attach to adults); that this attachment should underpin better outcomes, particularly in education; that there should be a choice of high quality provision; and both that provision and the system around it should be well managed.

As a majority of the children who must be placed have experienced abuse and with a number also likely to have a disability or ongoing health condition, the task of finding an appropriate placement is both complex and daunting: obtaining such a new family home for children presents a challenge for both policy makers and practitioners.\textsuperscript{1013}

I first discuss what ‘permanency’ is: where and how did the concept originate and its definition. This leads onto ‘permanency planning’, which embraces two meanings: firstly, the legal and administrative procedures that must be followed to get to the permanency outcome and, secondly, the paradigm of psychological permanency (and with this being seen from the child’s perspective).\textsuperscript{1014} Permanency in the New Zealand experience context is then considered. A vexed question arises: can ‘permanency’ be a ‘state of mind’ without more, being a subjective perception held by the caregiver and the child? Or is it the case that in order to achieve permanency, that state of mind must be present together with a legal framework placing the child in the care of his or her caregiver? This is a critical dynamic relating to the permanency discussion.


\textsuperscript{1014} RP Barth, above n 31; Gillian Schofield, above n \textsuperscript{1012}; Gillian Schofield and others, above n \textsuperscript{1014}.\textsuperscript{9}
11.2 Permanency: its origins

The concept of permanency originated in the 1959 US study *Children in Need of Parents*.1015 This found that large numbers of children had been unnecessarily left in temporary substitute foster care placements without steps being taken to find permanent homes for them, and without proper care plans.1016 ‘Drift’ occurred.1017 As a consequence these children spent a major part of their childhood in foster care. This same experience was confirmed in the United Kingdom by Rowe and Lambert in their important 1973 study *Children Who Wait*.1018

From the 1970s onwards, in England and the United States, permanency and permanency planning became a focus for social science researchers. New Zealand also adopted this, coinciding with the era when social workers were trying unsuccessfully to return children to their birth parents.1019

11.3 Why permanency is important

The immediate precursor to understanding the importance of permanency was the recognition that the consequence of ‘drift’ in care was profound. It resulted in children “being deprived of a sense of belonging and identity forged from experiences of family, community, cultural and school ties, with negative consequences flowing on into adulthood.” 1020 The risks


1017 Drift in care can also be accompanied by a parallel process: delay in the responsible court in making findings necessary for children to be permanently placed. This arises because the birth parents challenge the allegations of neglect and/or abuse and placement decisions for the children must by necessity be put on hold pending that determination.

1018 J Rowe And L Lambert *Children Who Wait* (Association of British Adoption and Fostering Agencies, London, 1973) cited in Biehal and others, above, and also by Masson, above n 32.

1019 Atwool, above, n 725; see Dalley, above, n 311; Yates, above n 1016.

1020 Tilbury and Osmond, above, who also note the deleterious outcomes arising from drift. There is a plethora of literature on the topic. See for example (and as well) Biehal and others, above; Brown, above n 168; Department of Child, Youth and Family, above n 63; Department of Child Youth and Family Services, Practice Centre, above n 44; Yates, above n 1016.
attached to drift in care are well known. Attachment is another significant theme pertinent to the permanency hypothesis. This is succinctly summarised by Freundlich with reference to the findings from a number of studies carried out between 1998 and 2004 and establishing that:

...absent a strong attachment to at least one caring adult, a child is at risk for lifelong difficulty interacting with others and is more likely to confront challenges in becoming and remaining independent, handling emotions, functioning intellectually, and coping with stress.

This is consistent with other research showing that children in care want a normal family life within an accepting family, with their origins respected, having a voice when appropriate and being provided with a springboard for later life. This requires the provision of good parenting, the provision of an attachment relationship, doing well at school, and the development of a sense of identity. It is therefore necessary to address both needs – arising from the legacies that the child may have from their care and protection history (which may include their biological inheritance) and their history of care – and the wishes of the child.

11.4 What is permanency?

Like art, observers know permanency when they see it, or when they want to see it. However, what permanency means to each of the participants in any specific case depends on that person’s role or position. There is widespread confusion as to what exactly is meant by the term “‘long-term fostering’ or ‘permanence’”. A study of what stakeholders in New York City understood by the term found that despite the ostensible clarity of what was embraced by permanency, those most directly affected (the children, parents and caregivers) often did not understand the implications of it for themselves or how the principle worked in

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1021 See for example (and as well) Biehal and others, above; Brown, above; Department of Child, Youth and Family, above n 63; Department of Child Youth and Family Services, Practice Centre, above n 44; Yates, above n 1016.


1023 It should also be noted that there are perhaps two categories of children who come into permanent care who may not have necessarily have suffered abuse or neglect – babies and infants who have been removed from mothers at birth or soon after and who have a history of inability to provide safe care, and children whose parents are, for example, unable to provide care by virtue of incapacitating mental illness or similar.

1024 Biehal and others, above n 837.

1025 Triseliotis, above n 515, at 23.
child welfare practice. This is also an issue in New Zealand where permanency is seen by social workers within the specific paradigm of caregivers making an application for orders under COCA for day-to-day care and guardianship. They seem (generally) to be unwilling or unable to see permanency in any broader perspective.

British authors, Schofield and Beek and Schofield and Ward, refer with approval to the definition of ‘permanency’ cited in the ‘Prime Minister’s Review of Adoption’ -“The security and well-being that comes from being accepted as members of new families.” They argue this definition:

…captures the core elements of security, which may be thought of as including both relationship security and stability over time; well-being, which includes a range of developmental outcomes; and family membership as part of the new family – which will always need to be balanced with continuing membership of the birth family.

Permanency has elsewhere been described as a “state which aims to promote the child’s physical, social, and psychological well-being through providing consistent care, stable relationships and a social base in life from which to face adulthood.” Likewise, the New York study noted above states that “permanency stems from one guiding principle: all children have the right to a healthy and safe childhood in a nurturing, permanent family, or in the closest possible substitute to a family setting.” In New Zealand permanency was defined in the CYFS 2006 Permanency Policy as:

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1026 Freundlich, above n 1022. The study involved not only children who were in care, but also birth parents, foster parents (including those who adopted a child) and child welfare professionals. The phrase ‘permanency’ as a matter of legal jargon was more meaningful to those child welfare professionals as opposed to other participants.

1027 This has been the dominant theme since the introduction of the Home for Life Policy in 2010.

1028 This assertion is based on personal experience in representing children, caregivers and birth parents in permanency proceedings in the Family Court. The discourse of social workers is to talk of the child receiving a ‘Home for Life’ as opposed to a ‘home for life’. Discussion with caregivers reinforces this perception.

1029 These are related books: Schofield and Beek, above n 515, being a “study of care planning a “good practice guide” with Schofield and Ward, above n 896, being as described by the title “study of care planning.”


1031 Schofield and Beek, above at 1 (emphasis in original); Schofield and Ward, above at 2. Although noted in relation to adoption, there is no fundamental difference between adoption and permanency for present purposes. The one area of distinction is with the particular legal consequences that flow if adoption is the vehicle used to effect permanency. This is canvassed below.

1032 Marsh and Trsieliotis, above n 695, at 5.

1033 Freundlich and others, above n 1022, at 743.

1034 Department of Child, Youth and Family, above n 63, at 3.
…a permanent living arrangement that provides continuity of relationships with nurturing caregivers where there is a sense of emotional, cultural and personal belonging, and the opportunity for lifelong attachments… . Permanency is a way of thinking, planning, and acting in statutory social work practice that promotes belonging, attachment, continuity and stability in a child or young person’s life.

The subsequent CYFS 2010 document *Why You Should Care: Your Care Matters: a plan for children in care*, which introduced the Home for Life policy, described permanency as important because: 1035

All children need to feel they belong somewhere with people who will love them and care for them. This secure attachment is essential for a child to develop a sense of self-worth, emotional security and pro-social behaviours.

A child develops best when a spectrum of needs are met consistently over an extended period by the people with whom the child is attached. Children who experience abuse or neglect are at greater risk of poor development because of their experience of trauma. In order to recover, these children need loving, safe, and continuous care. Our role is to support their parent or caregiver to ensure disruption is minimized and their ongoing attachment, health, education and well-being needs are met.

From the child or young person’s perspective it is imperative that they are placed in a permanent stable home, as soon as possible. Research suggests that for pre-school children, these need to be within six months of a change. 1036 For school age children a stable situation is critical within 18 months to 2 years of their first move. Older children require an assessment of their needs and what type of arrangement would best suit them, for example their level of independence and whether a traditional family-type placement will best meet their needs.


1036 The assertion as to age is not referenced. See as well the criticism by Coyle, above n 656: such timeframes may not allow the parents of the child time to effect the requisite change which, if achieved, could see the child returned. This conflicts with s 7(2)(c)(iii) of the Act – the Chief Executive is required to support the role of families, and s 7(2)(c)(iv) – to avoid the alienation of children from their families. Coyle also suggests that the policy is in conflict with arts 7 and 19 of UNCROC, notwithstanding articles 9(1) and 19(1) which refer to the right of the child to be protected from abuse. “In order to comply with UNCROC, non-parent permanency should be considered only after the State has resourced the parents to attempt to address their issues which led to their children being in care in the first instance.” (At 46)
It is important for us to remain child centred and focused on the needs of the particular child, young person or sibling group. It is important not to delay decisions around permanency because of adult issues. Delays may contribute to placement breakdown, attachment problems or behavioural concerns for the child.\textsuperscript{1037}

All children need to feel like they belong somewhere. Permanency is a permanent living arrangement for a child or young person that provides them with a lifelong relationship with nurturing caregivers in a home that they can grow up in. For some young people permanency can mean reaching independence with the skills and confidence to care for themselves in the community. In these situations too, the young person needs to connect with or be connected to people that will also be there for them into the future.

The CYFS practice centre states that when permanency is necessary:\textsuperscript{1038}

\begin{quote}
\ldots we want to find them [the children] a home for life where they will feel loved, wanted and valued. Creating a home for life for these children… is the key to establishing as sense of belonging and promoting their well-being.
\end{quote}

The CYPF Practice Centre acknowledges that children achieve their potential best:\textsuperscript{1039}

\begin{quote}
\ldots when they are safe, secure and feel they belong. When it is not possible to return a child [to birth parents] … we want to find them a home for life where they feel loved, wanted and valued. Creating a home for life for these children and young people is the key to establishing a sense of belonging and promoting their well-being.
\end{quote}

Paula Bennett, the responsible minister, in announcing the 2010 policy, identified a ‘home for life’ being achieved when “whānau or foster parents make a lifelong commitment to a child in foster care and they are no longer in Child, Youth and Family’s care.”\textsuperscript{1040} The policy contemplates the discharge of orders under the CYPF Act (that are in favour of the Chief

\textsuperscript{1037} Bennett, above n 43.
\textsuperscript{1038} Department of Child Youth and Family Services Practice Centre, above n 1036, and updated as at 3 April 2012 and still current as at 28 June 2013.
\textsuperscript{1040} Bennett, above at 16.
Executive) and the caregivers obtaining parenting orders under the COCA. This is an integral part of CYPF policy – in practice at least.

What underpins each of these definitions is ‘attachment’. Schofield and Beek identify the ‘secure base model’ as fundamental to good practice in permanency cases. This is achieved through the supervisory relationship between the social worker and the caregiver and with the social worker being engaged in supporting the caregiver in order to provide a secure base for the child. The secure base paradigm embraces five dimensions: availability, sensitivity, acceptance, co-operation, family membership, and with the first four of these are rooted in attachment theory.

11.5 Dimensions of Permanency

Permanency is not a single overarching concept. There is a goal, the placement of the child in a family home that is sustainable over the term of the child’s life and the successful transition into adulthood. However, permanency is a more complex concept as it is not only an end in itself, but also, in part a means to other ends as well. These are, in turn, promoted by the care system, and include school achievement and involvement in work; the avoidance of abuse; mental health; relationships with others, and social behaviour. These are outcomes the care system strives to achieve for the children who are placed within it.

Sanchez, in a study of young people, described three aspects of permanency: firstly relational, legal and physical and that the most critical aspects of permanency were, for the children, the relational and emotional factors. They emphasised matters such as love and emotional support and commitment to there being relationship continuity. Sinclair’s 2005 study refers to four dimensions of permanence that may be present.

1 Bennett, above n 43.
1042 Schofield and Beek, above n 515, at 66. There must first be a secure base for the caregiver of the child to work from. This is achieved through the supervisory relationship between the social worker and the caregiver. Secondly, is the need for the social worker to be engaged in supporting the caregiver in order to provide a secure base for the child.
1043 At 66.
1044 Sinclair and others, above n 1012.
1045 RM Sanchez Youth Perspectives on Permanency (California Permanency for Youth Project, San Francisco CA, 2004), cited by Freundlich and others, above n 1023, and by Tilbury and Osmond, above n 1015.
1046 Meaning respectively, relational which meant stable and unconditional emotional connections, legal, as officially determined by the court system, and physical, which embraced safe and stable living environments.
Objective permanence: This occurs if children have a placement which lasts for their childhood and would provide back-up and, if needed, accommodation after the age of eighteen years;

Subjective permanence: This would be high (achieved) if the child feels he or she belongs to the family, sees the family as their own and does not feel excluded by it;

Enacted permanence: This is achieved if all concerned behaved as if the child was a family member and the family a lasting unit – being included in family occasions (weddings and holidays); with the caregivers fighting for the child’s needs (going that “extra mile”); calling the caregivers mum and dad, and by the contributing to the working of the family unit;

Uncontested permanence: Where the child does not feel any clash of loyalties between her new family and their birth family.

The permanency paradigm as a first response embraces the return home of the children before other options are considered. Thomas’ definition includes this dimension:  

Placement with a family – which may be the birth family – as a result of which children experience stability, security and a sense of belonging, in confidence that their needs will be met by parents who genuinely care for them as individuals, and with whom, barring unforeseen accidents, they will remain until they are adults – or longer if they wish or need to.

Thomas then identifies four key elements of the definition: placement with a family; the child’s experience of stability, security and belonging; the child’s confidence in being genuinely cared-for; and the expected continuation of the relationship into adult life.

This discussion identifies that permanency has, as its essential component, the child being accepted as a member of a new family and from that comes the experience for that child of being nurtured and loved. The definition endorsed by Schofield and Beek, the security and

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1049 Thomas, above, at 135.
well-being that comes from being accepted as members of new families - encapsulates this. The permanently placed child requires the security and stability in care relationships that comes from being unconditionally accepted; nurturing connotes well-being that in turn captures developmental outcomes, whilst love gathers within its ambit emotional and psychological factors that reinforce the process of being incorporated into the new family. It must also be accepted that the meaning given to permanency in any particular case will also depend on the particular facts of that case and on where each participant in the process stands. Each case therefore requires its own specific assessment of what is required, with policy makers being prepared to implement practices that enable social workers to better match children and potential carers. 1050 This has led Sinclair to opine that what is needed to complete the fit between foster care and permanence is the “development of a form of foster care that more nearly approaches a “family for life”. 1051 Integral to this is the subjective perception of the child to feel that he or she is accepted in to the family and that there is an unqualified commitment to that which is expressed by both actions and statements of those providing that care. This must the goal for the permanently placed child.

11.6 Permanency planning
Planning for permanency is a fundamental aspect of the process to be followed for children who cannot live with their birth parents. It has been the guiding principle in child welfare since the 1970s1052 and, by the 1990s, had become canon for social workers.1053 Permanency planning in its original conception envisaged a child as “deserving of a permanent lifetime family – through reunification with the biological family or, should that not be safe, through adoption”. 1054 This looked at two principal outcomes only - return home or adoption (but nonetheless embraced long-term foster care). There was a critical response to it; despite some initial success, drift in care continued, the numbers of children in care rose and the numbers of children re-entering care increased: permanency planning was too mechanistic,
undervalued long-term care and failed to address the child’s biological heritage. Its next emphasis intended to address those concerns: firstly, psychological permanency for the child with the caregiver was sought (this being the child’s sense of permanence), so that in the USA adoption fell away as the preferred permanency vehicle and long-term fostering was instead used. Secondly, the child’s connection to family and kin – whānau, hapū and iwi within the New Zealand context - was promoted.

Permanency planning conceptualised permanence as including both policies and practices in order to address concerns about stability for children in care and the “importance of a family in a child’s development” initially through unification with the child’s birth family or, if that was not possible, through adoption and later, through foster care, both kin and non-kin. The process of permanency planning has been described as:

… the systematic process of carrying out within a brief time-limited period, a set of goal-directed activities designed to help children live in families that offer continuity of relationships with nurturing parents or caretakers and the opportunity to establish lifetime relationships.

This definition is noted and adopted with some variation in wording by others: “time-limited, goal directed efforts to help children with nurturing adults who offer stability and an opportunity for lifetime relationships;” permanency planning encompasses systematic, goal-directed and timely case planning for all children in care.

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1055 EJ McFadden *Practice in permanency planning for family continuity* (Contemporary group care practice, research and evaluation, 1995) 5: 13 – 21 cited in Barth, above n 31. See as well Rangihau, above n 18, for the similar New Zealand critique of this.
1056 Barth, above n 31.
1058 Maluccio, Fein and Olmsted, above at 2; Barth, above n 31 refers to the paradigm having two aspects: firstly, the legal definition referring to process, the time frames, reasonable effort requirements and administrative procedures that are involved; secondly, and most importantly, the notion of psychological permanence.
1059 See for example, Rath, above n 1016; Tilbury and Osmond, above n 1015; Barth, above n 31; Fowler, above 1008.
1060 Rath, at 2. Permanency planning also encompasses supporting families to prevent the removal of children from their homes and to work with families to enable children to be returned to families. Maluccio, Fein and Davis, above n 1053; Tilbury and Osmond, above n 1016.
1061 Tilbury and Osmond, above. This is irrespective of the ultimate placement outcome, which could be a return to family or not.
Inherent within permanency planning is the dual paradigm of it being both time-limited (making decisions within the timeframe of the child)\textsuperscript{1062} and goal-orientated (for decisions to be made about whether the child can be returned to his birth family or whether alternative care is required (within a child-focused time-frame). It is difficult to predict whether a placement will be successful given the myriad of factors that will come into play when a child is placed.\textsuperscript{1063} However, the nature and quality of the planning process in each case “will certainly contribute to outcomes in the short, medium and long term ... and will, in interaction with other factors, make a difference to children’s happiness and well-being.”\textsuperscript{1064}

Permanency planning, therefore, is not simply about placement. Fundamental to it, within the context of a permanent out-of-home placement, are the nature of relationships, identity and a sense of belonging.\textsuperscript{1065} Good planning increases the probability of good outcomes,\textsuperscript{1066} as opposed to the opposite occurring\textsuperscript{1067} and, where possible, with maintaining kinship relationships with birth and extended family in those cases where the child cannot be returned.\textsuperscript{1068} Also critical is the need for decisions for children being made in a timely manner and to be sustainable in the long term.\textsuperscript{1069} Decisions about where a child is to live on a permanent basis involve high-stake decision-making with far-reaching consequences for the children concerned. Decision-making, in this respect, must be evidence and research based as opposed to any other formulation.\textsuperscript{1070}

\textsuperscript{1062} And therefore complying with s 5(f) of the CYPF Act.
\textsuperscript{1063} These include: the age of the child at her entry into care; the nature and extent of the abuse or neglect suffered by the child and which was the reason why the child came into care; the care history of the child, including how many placements the child has had since being taken into care; and whether the child has been further abused or neglected.
\textsuperscript{1064} Schofield and Ward, above n 896, at 48.
\textsuperscript{1065} Tilbury and Osmond, above n 1015; Schofield and Ward, above n 896; see s 5(f) of the Act.
\textsuperscript{1066} Stability of placement, success at school, stable later relationships, and sense of belonging.
\textsuperscript{1067} Schofield and Ward, above n 896.
\textsuperscript{1068} Maluccio, Fein, and Davis, above n 1053.
\textsuperscript{1069} Tilbury and Osmond, above.
\textsuperscript{1070} Tilbury and Osmond, above. There should also be an emphasis on research because knowledge derived from research will strengthen practice and better inform policy formulation.
11.7 Permanency outcomes

In New Zealand CYFS has always identified five permanency options: remain at home; return home; permanency with whānau and permanency with non-family or whānau; and independent living.\textsuperscript{1071} This thesis is concerned with the final three of these options.

Permanency with whānau: This reflects s 13(f) and (g) of the CYPF Act. The option arises when children cannot return home to their parents within the children’s timeframe, but someone is found within the family or family group who can provide that child with a permanent home.\textsuperscript{1072} The caregiver will be required to think about how potentially difficult or complex family dynamics will be managed to ensure the child’s safety. It is a philosophical belief of CYFS that “one of the key strengths of a whānau placement is its potential to maintain strong relationships with parents while also managing the needs of the child on a permanent basis.”\textsuperscript{1073}

Permanency with non-family or whānau: This reflects s 13(f) and (h) of the CYPF Act. It arises when a child can neither be returned home nor placed within his family or family group. It is therefore the last resort placement option, as it is “expected that the vast majority of children will be permanently cared for by whānau.”\textsuperscript{1074} The policy promotes matching to “consider issues such as ethnicity, religion, availability of services, maintenance of ties with birth family, continuity of school and friendships among other things.”\textsuperscript{1075} The policy, importantly, but optimistically, refers to the new family needing to understand and support the child or young person having an on-going relationship with their birth family. Shanaia falls within this category.

Independent living: This generally embraces older children (and sometimes children who have been so abused and damaged that they cannot be placed). Children in this category may have recently come into the Chief Executive’s care or been there for some time and a

\textsuperscript{1071} Atwood, above, n 725; Gary Cockburn, above n 611; Connelly, above n 571; Department of Child, Youth and Family, above n 63; Derrick, Care of Children Act and Permanent Placement, above n 863; Yates, above n 828; Department of Child, Youth and Family, above n 63.

\textsuperscript{1072} Their whānau, hapū or iwi.

\textsuperscript{1073} CYP Practice Centre, above n 1040, at 3. This is a statement of aspiration and trust as opposed to anything based on empirical evidence. See Atwood, above n 729; Brown, above n168; Marie Connelly Kinship Care: A selected literature review (submitted to the Department of Child, Youth and Family, May 2003); and Mel Smith, above n 958, at [1.28], all dispute the validity of the statement. Smith expressed concern “at the lack of research and hard data relating to child welfare protection and at what is described as ‘kin placement’”.

\textsuperscript{1074} Department of Child Youth and Family Services Practice Centre, above n 1036.

\textsuperscript{1075} Department of Child Youth and Family Services Practice Centre, above.
permanent placement has not been found. They have to be assisted to achieve the skills and knowledge to allow them to live successfully as an independent young adult. Zeppelin comes within this category.

11.8 The New Zealand experience of permanency

The period from the 1970s onwards through to the early 1990’s was one of significant change in New Zealand. Initially there were the oil shocks, massive inflation, rising unemployment and direct governmental control of the economy by regulation. This took on a new character with the 1984 snap election and the subsequent radical change in social and economic policies implemented by the 1984 Labour government and its 1991 National successor. The rhetoric and policies of the monetarist new right were adopted and implemented. This led to a profound re-analysis of the respective roles of government and citizens in society. The cost of providing social services was closely scrutinised and critically examined as there was considered to be too much welfare dependency. Government also wanted to address the effectiveness and efficiency of the public service. This was achieved by the introduction of the State Services and Public Finance Acts of 1989. The essential philosophy embraced by these reforms remains intact today.

In the social services arena, the focus was on shifting across to families and communities at least part of what had previously been the responsibility of the State for the provision of necessary services. Foster care (primarily) and departmental family homes provided the bulk of out-of-home care. They “were the manifestation of the strong ethos of family – and community-based approaches to children’s welfare, with the family identified as the crucible for children’s well-being.” Foster care had the advantage of being the cheapest form of care available, but both were administratively easy to operate. Nonetheless, a process of re-appraisal was taking place as to the utility of foster care within the broader re-examination of social policy, the role of the State in respect of families and welfare and the rights of

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1076 See amongst others who have commented on this: Atwool, above n 729; Connelly, above n 571; Cockburn, above n 611; Dalley, above n 311; St John and Wynd, above n 571; Tapp and Taylor, above n 560.
1077 States Services Commission New Zealand's State Sector Reform: a Decade of Change (State Services Commission, Wellington, 1996).
1078 Atwool, above n 729; Dalley, Tapp and Taylor, above.
1079 Dalley, above.
1080 Dalley.
children and families. Foster care was now looked at with askance – as policy makers strove to see how to reduce the number of children coming into care and to restrict the degree to which the State intervened in the lives of families. At this same time the Māori reawakening, exemplified by Puao-Te-Ata-Tu, was also occurring. This highlighted the disempowerment of Māori and the racist, colonial paradigm of the Department of Social Welfare and assisted in the shift of focus away from the beneficence of state care for children.

A ‘departmental’ conference convened in 1976 found that there was a “disturbing aimlessness in much of our work in the area of children in care.” Yates notes that in the late 1970s, research showed that children who were in care experienced an average of 6.5 placements for every five years spent in care, resulting in an increased emphasis, from mid-1981, on addressing drift in care and the need to find permanent homes for those children. This saw greater goal-orientated social work. By the mid-1980s there was a clear programme finding permanent homes for children who were in care. It produced results, as in the years prior to the introduction of the 1989 Act, there was a significant reduction in the numbers of children in state care. Another departmental working party in 1984 explored permanency options, including open adoptions, guardianship for foster parents, and dispensing with parental consent for adoptions where appropriate. There was:

… an ideology of permanent care, in terms of which children would be assured of continuity, stability and belonging as of right … [and would be] in most cases ... realised in the birth family, whether within whānau, an extended family, or another culturally appropriate grouping.

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1081 Dalley, above n 311.
1082 Dalley.
1083 Rangihau, above n 18.
1084 Yates, above n 1016. Presumably this was within the then Department of Social Welfare, the predecessor to the Ministry of Social Development.
1085 Yates, above n 1016; Yates, above n 829. Yates cites Craig (1984) as the authority for the statement but does not refer to Craig in the list of references. There is no indication of where the research emanated from. Dalley, above n 311, refers to the same statistic attributing to MacKay, above n 755. Brown, above n 168, at 71 records advice received from the department that children in care averaged 3.1 placements in each year.
1086 Dalley, above n 311.
1087 Atwool, above n 920; Dalley, above; Yates, above n 1016.
1088 Dalley, at 329.
This emphasis changed with the passing of the Act. Social workers regarded it as providing a mandate to effect the return of children to their families,\textsuperscript{1089} irrespective of the time the children may have been out of the care of their birth families.\textsuperscript{1090} However, as noted above, by 1992 CYFS was an organisation in crisis, through a combination of financial constraint and increasing notifications, with many children now languishing in care.\textsuperscript{1091} The Mason Report referred to submissions made by social workers about that phenomenon. This was a trend which intensified in line with reduced governmental spending. This had led to the establishment in the larger metropolitan centres of specific units tasked with the responsibility of finding permanent homes for children - in place of adoption and long-term fostering (both of which had previously been used prior to the changes wrought by the Act). The security of the placement would be effected by “legal process, usually by shared guardianship with the Department of Social Welfare.”\textsuperscript{1092}

However, as noted in Chapter Ten, the situation failed to improve and this led to the need for further inquiry, the Brown Report. This observed that children who lack adequate parental care should be treated as a “basic concern for our community.”\textsuperscript{1093} The report went on to observe: \textsuperscript{1094}

Clearly the lack of a coherent and principled approach to the placement, protection and care of New Zealand children whose birth families cannot, or will not provide properly for them does a disservice to these children.

\textsuperscript{1089} Atwool, above n 920.
\textsuperscript{1090} 1999.
\textsuperscript{1091} See Chapter Ten.
\textsuperscript{1092} Mason, Kirby and Wray, above n 611, at 74. The report went on to cite extensively from the submission from the Permanent Placement Unit, Auckland. This noted that a benefit of the process it followed was that once the caregivers took legal responsibility (orders for custody and guardianship) the Department’s financial commitment is limited as the PPU role was itself limited. There was no on-going social work once the caregivers had taken orders. Prior to that occurring, the Unit did take on responsibility for social work once the decision to permanently place the child had been taken by the responsible site office. Those offices did not have the skills or expertise or the work load capacity to find caregivers and place the child, at 75.
\textsuperscript{1093} Brown, above n 168, at 76.
\textsuperscript{1094} At 76. Brown did not further address this issue as he was aware at the time of writing his report of the then just published report from the Law Commission, above n 562.
This was a depressing assessment of the situation for those New Zealand children who were in need of alternative permanent care. Brown cited Duncan and Worrall who accepted (as most commentators do) that although the Act was radical in its terms and aspirations: 1095

One of the most concerning issues is that such innovative legal and practice reform was introduced with no longitudinal research established concurrently to measure outcomes. Although the Children, Young Persons and Their Families Act states that ‘research should be implemented on the effects of social policies and social issues on children and their families/whānau’ and that the outcomes of ‘services delivered by the Department and other organisations, groups and individuals be evaluated’, it has taken a decade to begin that process.

The Act brought about significant policy and legislative change. Positive changes occurred: it embraced permanency planning by way of statutory reviews conducted by the Family Court; 1096 there was focus on the need for decisions to be made within the timeframe of the child; 1097 and recognition of the need for significant psychological attachment to be achieved for children who were to be permanently placed. 1098 That focus on attachment led to an alternative goal (to that of returning home) – to secure the child’s placement with foster parents. 1099 However, that anticipated promise remains unfulfilled, notwithstanding that the Act encapsulated the notion of permanency planning. There was a "general belief at this point" 1100 that the number of children in care would not rise to previous levels due to the legislative checks and balances put in place by the Act. This did not eventuate, despite the promise of the Act to address the drift conundrum. 1101

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1095 Grant Duncan and Jill Worrall in Brown, above, n 168 at 15.
1096 The Act requires the Family Court to review certain orders that are made following the making of a declaration by the Court a child is in need of care and protection. For present purposes reference need only be made to orders for custody (ss 101) and sole (not additional) guardianship.
1097 As prescribed by s 5(f).
1098 See s 13(h).
1099 Atwool, above n 920.
1100 Yates, above n 828, at 37.
1101 Atwool, above n 725; Dalley, above n 311; Brown, above n 168; Yates, above n 1016; Yates, above n 828. Here Yates noted at 37 that the CYPF Act encapsulated the notion of permanency planning in its review provisions and that there was a "general belief at this point" that the number of children in care would not rise to previous levels due to the legislative checks and permanency planning. Any discussion about permanency occurs within the concept of planning for permanency: “permanency planning is the process of making long-term care arrangements for children with families that can offer lifetime relationships and a sense of belonging.” Tilbury and Osmond, above n 1016, at 266.
11.9 Developments since 2000

Discussion around achieving permanency in terms of the most appropriate legal structure and of the obligations that ensue once a child is permanently placed has not had particular prominence in New Zealand. However, there is a body of writing on the topic, albeit with some being on related issues such as the nature and kind of supports that may need to be provided to children who are permanently placed and their new caregivers or contact within a permanent placement. There was now a much more concerted effort on the part of CYFS to address issues for children in care. In December 2004, the Chief Executive began the process of developing a substantive policy on permanency. The policy was formally announced in March 2006. Implementation and adherence to the policy became a mandatory aspect of social work practice. This policy was comprehensive, addressing in detail what permanency entailed, its conceptual underpinning (attachment) and the extensive range of post-permanency supports that could be provided to the caregivers of permanently placed children.

Subsequent government pronouncements and policies have continued to emphasise the need for permanency for children in care being obtained and for this to occur as soon as possible. The 2010 Ministerial discussion paper “Why You Should Care – a plan for children in care” and the implementation of the ‘Home for Life’ policy took the discussion onto a new level in terms of the political statements that accompanied the policy announcement. The Minister identified that the “next best thing is a safe, loving home with extended whānau, or foster parents who are willing to give them a ‘home for life’.” The challenge of securing

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1102 Atwool, above n 725; Atwool, above n 52; Coyle, above n 656; Rita Derrick “Children in Care and the Right to Belong: making contact arrangements work for children” (2004) 27 Social Work Now 19 - 24; Derrick, above n 828; Yates, above n 828; Smith, above n 523.
1103 For example, see Cooke “Permanency for Children: Why Permanently Placed Children Need On-Going Support, and How to Deliver that Support”, above n 34; Derrick, above n 828.
1104 See Cooke “Contact Issues for children Who Have Been Permanently Placed Out of Their Birth Families”, above n 34A
1105 Prior to this there appears to have been no national policy as such. Rather, there were local initiatives, of which the Permanent Placement Unit based in Auckland was very much at the forefront. See for example the articles of Derrick, then head of the Permanent Placement Unit, Children in Care and the Right to Belong above, and the unpublished pamphlets Contact Issues of Permanent Placement and Care of Children Act and Permanent Placement, above n 828.
1106 Department of Child, Youth and Family, above n 63.
1107 Coyle, above.
1108 Cooke, above n 34; Coyle, above.
1109 Bennett, above n 43.
1110 Bennett, above, n 43, at 13.
this ‘home for life’ is recognised with the necessity of finding someone prepared to make a “lifelong commitment to a child who needs them” and with being “our greatest challenge.” The ‘Home for Life’ policy maintains a focus on children being given a “home they can call their own, for as long as they need it.” My concern is that despite the rhetoric espoused by the policy, implementation is not matching that promise.

11.10 What is required of the State?

Children who must be permanently placed require those who make those decisions for them to know what they are doing and why they are doing it. This includes finding the right placement for the specific child and correctly identifying the social work (including therapeutic/financial) supports that the new family requires. This necessitates a “permanence mindset, a commitment to ensuring that all children are helped to feel secure in the foster family and that foster families are supported to offer commitment to the child through to adulthood.” Maluccio refers to “recent reunification research ... that the professional qualifications of staff members make a difference in program outcomes.” Dalley notes criticism about inexperienced social workers and lack of departmental support in a 1985 review into foster care, while Yates observes that “social work skills in the field of care, and especially in permanency planning, were extremely limited (that there had been no training since 1989.)” Inquiries that have occurred into the death or injury of children have also commented on CYPF procedural/systems failures and by either overt comment or implication have referred to training issues. In 2003, the report into the deaths of Salie and Olympia Aplin recommended that the Chief Executive restate to staff relevant policy and procedure relating to investigation and assessment of child protection notifications, that compliance with policy be a performance measure in individual performance objectives, and that social workers receive training in family violence and in how to interview, listen and

1111 Bennett, at 15.
1112 Department of Child Youth and Family Services Practice Centre, above n 1036, at 3.
1113 Schofield and Beek, above n 515, at 4.
1115 Dalley, above n 311.
1116 Yates, above n 828, at 39. Dalley, at 363 observes that “[T]raining and staff competency programmes, which were begun in earnest in 1992, have fallen way behind schedule.” Tapp and Taylor, above n 560, at 99, (footnote 77) refer to a 1987 Department of Social Welfare paper “Research Implications of Review of Children and Young Persons Legislation: Child Protection” where reference was made to training resources were inadequate for new staff.
respond to children. The 2003 Baseline Review conclusion that there was a large variability in the quality of service delivery and that overall performance was often poor is of similar effect. The 2011 Smith Report expressed similar views. That CYPF practices and procedures were not as robust as they need to be were acknowledged in the press release advising of the department’s response to Mel Smith’s report where it was stated that “if a whole range of systems, practice and laws were more child-centred” then the abuse that was the subject of that inquiry might not have occurred. Inherent within this are issues of staff competency and staff training, reflecting the recommendations that there should be a:

... review of existing processes and systems relating to social workers inputting information into CYRAS, and that the thoroughness of the training systems be examined as part of that review process.

It was also recommended that the Chief Executive should:

... develop a training plan covering all work undertaken in the regions and individual sites which will uplift the levels of social work skills and practice, supervision processes and skills throughout Child, Youth and Family. With regard to the training of social workers, the requirements of a Support Order under s. 93 of the CYP & F Act need to be emphasised.

Social work practitioners need up-to-date knowledge in respect of the relevant literature (family belonging, child development, attachment, and permanency) and must particularly address the particular child and her particular circumstances. Given the crucial significance of the task of ensuring a nurturing and permanent placement for the child is found, and then supported as necessary, there needs to be skilled social work practice in every element of the permanency task – from the recruitment of caregivers, the matching of

1118 Ministry of Social Development, above n 920, at 2.
1119 Ministry of Social Development, above n 920; Mel Smith, above n 958.
1121 Mel Smith, at 93.
1122 Mel Smith at 95.
1123 Mel Smith, above; S Smith, above n 523; Thomas, above n 672; Tilbury and Osmond, above n 1015.
children to caregivers, the approval process, to the provision of supervision for caregivers and post-permanency supports for the new family.\textsuperscript{1124}

It is a fundamental responsibility for both policy makers and practitioners that systems are robust and transparent when implemented. The regular bouts of re-structuring since 1989\textsuperscript{1125} have hindered the development of a cadre of specifically trained and qualified social workers with skills in the field of finding placements for children who must be permanently placed.\textsuperscript{1125A} There is then insecurity for all concerned – social workers, families and children. This led to a concern that children in long-term care were receiving lower priority than children who were the subject of new referrals, and that there “was widespread acknowledgment that work with children … in care was an aspect of practice that had been neglected and most sites had plans in place to address this.”\textsuperscript{1126}

This is not a solely New Zealand phenomenon. Schofield and Ward found that less than half of the English local authorities had specialist workers or teams for children in long-term placements. However, most of those workers/teams “seemed to be looked after children teams who were specialist in the sense of planning for and supporting looked after children in a range of placements and not having competing work in child protection.”\textsuperscript{1127} They also reported that 50 per cent of the responding local authorities offered post-qualifying training on long-term/permanent fostering.\textsuperscript{1128}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{1124} See the authorities cited in the preceding references under this paragraph heading. See also Fowler, above n 1009; Schofield and Beek, above n 515.
\item\textsuperscript{1125} And not overlooking what occurred prior to 1989; see Dalley, above n 311.
\item\textsuperscript{1125A} See also Chapter 10 above. That discussion is highly pertinent to the issues canvassed in this chapter.
\item\textsuperscript{1126} Atwool, above n 52, at 174. Atwool interviewed a number of site managers and practice leaders. Some CYPF sites having quite different structures, with some having specialist teams (permanency, high complex needs) and others having generic teams dealing with everything (intake, assessment and intervention and then care). At pp 174-175, Atwool observed that the work undertaken with children in care had to be “interwoven” into everyday work; there was a challenge for managers in getting social workers to visit children and to form relationships with them; permanency work was a challenge, managers had change mindsets of social workers to “ensure that ‘CYF care is a train station and not a destination”.
\item\textsuperscript{1127} Schofield and Ward, above n 896, at 75. This was in respect of those who responded to the survey that was conducted. Local authorities were asked whether they had child and family workers or teams who specialised in working with children in long-term or permanent placements and whether specialist training on permanence was provided.
\item\textsuperscript{1128} 34 local authorities. Some authorities had dual teams (responsible for both child protection and for long-term/permanent fostering) and others had single dedicated teams. More local authorities with single dedicated teams offered this training in contrast to those without such teams. (79%, 21 in comparison to 33%, 13. Schofield and Ward, above n 896, at 76.)
\end{itemize}
\end{footnotesize}
A Canadian study, that examined the situation of children in care in Newfoundland and Labrador, commented in respect of foster parents that contemporary child welfare research indicates that recruitment and retention of foster parents is a major issue. The former is affected by social changes (and corresponding financial stresses) that have seen more women working out of the home and an increase in single parent families, while the latter is a manifestation of foster parents being frustrated by their experiences in the system, by their having to assume too much of a financial burden, by having insufficient respite care, inadequate consultation and support from social workers, poor response to emergencies that arise, inadequate training and few opportunities for input into training or services that are required by foster parents. Further, dissatisfaction by existing foster parents can influence future recruitment.

11.11 Must orders be taken to achieve permanency?

An important issue is whether private law orders are a prerequisite to achieving permanency for a child. The caregivers of Shanaia who have the task of caring for her until she reaches independence, will make, or be asked to make (and possibly sooner than they feel comfortable), applications for discharge of CYPF Act orders and for COCA orders to be made. Since the introduction of the ‘Home for Life’ in 2010 there is an explicit expectation that this will occur. The CYFS Practice Centre contains the policy statements relating to permanency.

The document “Permanent Care and Creating a Home for Life”, under the sub-heading “How will I know when permanency is achieved?” refers to a ‘home for life’ (i.e. permanency) being achieved:

… when all of the following has occurred:

1129 Fowler, above.
1130 Irrespective of whether it is a kin or a non-kin placement.
1131 Anecdotal experience arising from representing caregivers over many years, as lawyer for the permanently placed child, and discussion with fellow practitioners suggests that once a child is “permanently placed” by the Chief Executive there is a push for the new caregivers to get orders in their favour under COCA and for the role of the Chief executive to come to an end. See Atwool and Gunn, above n 506.
1132 If COCA orders are not taken when CYPF orders are discharged, custody of the child reverts back to the person previously entitled to care of the child. This is what occurs in cases of children returning to birth families. Accordingly, the new family must assume legal status to avoid any consequential legislative vacuum, See s 109 in respect of custody orders and s 118 for guardianship orders.
the child or young person is in an approved home for life placement;  

the caregivers have obtained legal orders to secure the home for life placement;  

custody orders in favour of the Chief Executive have been discharged.

In contrast, the 2010 version of that same policy identified that permanency occurred when the:

... child or young person is in a secure, stable home that meets their needs, with permanent caregivers who have accepted responsibility for them. Ideally, the child’s parents will understand the reason for and the nature of the permanent living situation for their child and all custody and guardianship orders in favour of the Chief Executive will have been discharged. In some cases it will be necessary to continue orders for support and/or services for the child.

The obtaining of orders under COCA has become a mantra for many social workers in permanency cases. They believe that ‘permanency’ can occur only when COCA orders are obtained by the caregivers coupled with the proposition that children are aware of their status as a child in care and of there being a stigma that accompanies that status. Importantly, there is no statutory requirement for caregivers who have assumed permanent care of a child to assume legal status in respect of that child. That they do is but a policy requirement. This issue was addressed by the Family Court in one case where the Court-appointed psychologist gave evidence:

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1133 This is somewhat meaningless assertion as all children who are in care must be placed with approved caregivers. The only distinction arising here is that the caregivers have agreed to take the ‘package’.


1135 Department of Child Youth and Family Services Practice Centre (24 April 2010) <http://practicecentre.ssi.cyf.govt.nz/policy/caring-for-children-and-young-people/key>. The 2010 Practice Centre version went on to refer to a legal relationship between the child and caregivers will provide security for both and enable the caregiver to make important day-to-day decisions for the child. The policy also accepted that in rare cases permanency could be effected within a CYPF act framework.

1136 It is not specified whether “responsibility” in this context means the psychological or intellectual intention to commit to the child in question or whether it goes further and means the taking of legal responsibility. The latter seems inferred.

1137 This is an awkwardly phrased sentence; it could mean either the child’s birth parents or the new caregivers. It seems intended to refer to the former.

1138 Smith, above n 523.

1139 In the matter of the BMB and MNB children FC North Shore, FAM – 044-000074, 12 May 2008, at [48]. This was a case involving a review of plan which the presiding judge found to be inadequate and directed a new
… that the girls need to remain in a stable environment. She supports the present high quality placement with their present caregivers. She is not of the view that any permanent orders under the COCA Act is the correct way of addressing the children’s long term needs.

The Home for Life policy posed the important question of whether permanency can be achieved when orders remain in favour of the Chief Executive? The package is available only to those who have assumed care of a child who was in the care of the Chief Executive and who have now taken orders in their favour under COCA or the Act. The policy does not embrace those who have children in their care but with the Chief Executive retaining custodial status. This is logical as the Chief Executive remains the custodian in law of those children and responsible for them. However, it will be relatively rare for a child to have a continuing status under the Act following what is perceived by the Chief Executive as a permanent placement. This reflects the policy in respect of timeframes for achieving ‘permanent care and a home for life.’ For children under five years of age it is expected that the child will be permanently placed within 12 months of coming into care and, that within plan to be filed. Notwithstanding not having filed an application for discharge of the s101 custody order, the mother sought to use the review process as a vehicle to effect the return of the children. The Chief Executive used the plan to signal permanency and the need for COCA orders in due course. This had regard to the time the children had been in care and to their caregivers providing excellent care. (Lawyer for the children also misunderstood the nature of the proceedings and was in fact replaced at the end of the hearing.) The context was that the policy goal of the Chief Executive is to ensure that children are permanently placed under COCA orders. The children had a sufficient knowledge of their family; one had a particular attachment with their mother, and an inter-meshed familial relationship, such that there was a high likelihood that either or both of the children would want to return to their mother. The psychologist opined that in this respect the situation was not essentially different from the situation in private law where children, particularly in adolescence, move from one parent to the other. The psychologist thought that the children would remain in their current placement for at least the next 3 – 4 years. (The children at the date of decision were aged 8 and 5 years respectively.)

1140 This is set out in the Practice Centre, above n 1135. See also Bennett, above n 43. “This support package is available for approved whānau and non-whānau home for life parents: who legally secure a home for life for a child or young person through orders in their favour under the Children, Young Persons and their Families Act 1989 or through the Care of Children Act 2004; and where the child or young person was in the care of the Chief Executive under the CYPF Act 1989, ss 78, 101, 102, and 110. There may be occasions where a child or young person is in care under a s 140 Extended Care Agreement and it has not been possible to achieve the return home goal. If the concurrent goal is home for life the FGC is to be reconvened and consideration given to confirming the home for life placement. Under these circumstances the home for life support package can be provided.”

1141 For example, the document “Securing a bright and safe future in a home for life” when referring to “legal orders for home for life parents refers to their being a preference for legal orders under COCA and with no legal orders remaining in favour of the Chief Executive; the document “Creating Permanency” under the heading “Can Permanency be achieved when orders remain in favour of the CE?” states that it will be “rare for the parties (caregivers, child and the social worker) to agree that permanency can be attained in the absence of a private law framework. “This is an exception with the operation manager’s approval will be necessary before permanency can be recorded as being achieved in these cases”. Where there are what are described as ‘exceptional circumstances’, there will also be agreement to provide to the caregivers the home for life support package, See Department of Child Youth and Family Services Practice Centre above, n 1135, at 3.
18 months of that occurring, orders would have been made “to support the home for life placement.”\footnote{1142}{For children over the age of five, the time frames are extended to 18 months and 24 months respectively. Practice Centre, above n 1135.} The fact of permanency being achieved is formally recognised by provision of the accompanying supports – the ‘Home for Life’ three year support package which is offered to all “approved home for life family/whānau”. The situation of children who are the subject of extended care agreements should be briefly noted. Children may be the subject of such agreements but the underlying legal premise is that at their conclusion, the child will be returned to the care of the person previously caring for them.\footnote{1143}{This is notwithstanding the provision in the Act for agreements for extended care of children to be entered into. This can arise where children are in need of care and protection through having suffered abuse or neglect or where such risk may exist because of familial stress. See n 442 above. There is then another category of children – those who are mentally or physically disabled may also be placed with the Chief Executive (or other service as noted above) under a voluntary agreement made under s 141. These children may not be children who are in need of care and protection by virtue of their having suffered abuse or neglect as such but might still be within the definition of children in need of care and protection because of the inability of their parents to look after them. The period of time that applies in this latter respect may be for up to 2 years and may be extended for further periods of two years at any one time, subject to this being sanctioned by a family group conference. Further, children who are disabled within the meaning of the Disabled Persons Community Welfare Act 1975 may also be placed by agreement between the family (parent of guardian or other person having care of the child). Such placements can be made for 1 year only but may be extended by subsequent periods of 1 year by agreement of a family group conference. Where agreement under s141 is it is a statutory condition that an agreement will not be made if the Chief Executive is not satisfied that the parent, guardian or person having care of the child will resume care of the child at the termination of the agreement. Further, in respect of agreements that are proposed to be made under ss 140, 141 and 142, they shall not be made if the parent, guardian or person otherwise having care of the child is not willing to maintain contact with the child during the time of the agreement. The Vulnerable Children Bill 2013 proposes amendment of these provisions.} Thus every child in the care of the Chief Executive who is not able to be returned to the care of his or her birth parents will have a public law legal status under the CYPF Act.

The question of the legal framework required both to achieve permanency, and to subsequently support the child and his or her new family needs to be considered as part of the inquiry into whether the State is meeting its obligations to children in its care. Underlying this question, however, is the more fundamental one of asking what is required to make an intended permanent placement work? The discussion in this chapter illustrates that there is consensus that the essential requirement is the establishment, if possible, of an attachment relationship between the child and caregiver or, at the very least, a continuing commitment from the caregiver to the child which is recognised by the child. This is accompanied by resilience on the part of the child, of being able to do well in the face of bad experiences and adversity,\footnote{1144}{Gilligan, above n 1011. See also Atwool, above n 52; Thomas, above n 672; Bagshaw, above n 1011.} and with some children being naturally more resilient than others.\footnote{1145}
the child lacks that necessary quality, he or she must be assisted to the extent necessary so that they can assist in shaping their own futures, including their relationships. Ensuring that children are able to develop sufficient resilience to be able to cope with what they are confronted with is another facet of the responsibility that is owed by the Chief Executive to these children. Resilience is derived from the child experiencing a good attachment (and a secure base – in the broadest sense of including stability and consistency in care and living arrangements), supportive relationships (including caregiver and peer relationships) and good educational experiences. Finally, there is the child’s subjective view around belonging.

11.11.1 The stigma argument

It is sometimes argued that children in permanent out-of-home care require a private law legal framework in favour of the new caregivers because of the social embarrassment that arises due to the stigma associated with having that status. This mantra of the ‘CYFS kid’ is commonly stated by social workers to encourage caregivers (and lawyers for children) to proceed with obtaining orders under COCA in respect of the child who is being placed in their care. This occurs because of the perception that for ‘permanency’ to occur, orders must be taken and the child removed from the ‘books’. However, it needs to be treated with some caution as it is not a universal experience. It should also be noted that caregivers

1145 Thomas, above n 672, at 20.
1146 Gilligan, above, at 8. There is a significant literature relating to children as agents. It is well beyond the scope of this thesis to venture there.
1147 Gilligan, above n 1011; Sinclair, above n 1047; Thomas, above n 672.
1148 For example, Brown, above n 168, at 70, refers to having interviewed 10 young people who were either still in care or had recently left care. They reported feelings of “feelings of confusion, indignation and being treated as second-class citizens or criminals.” Similarly, Nicola Atwool, above n 52, at 40-41 refers to Brown and to two overseas studies each which referred to children talking of the social problems that arose from being in care. In the first, D McNeish and T Newman “Last words: The views of young people” in D McNeish, T Newman and H Roberts (eds) What works for children? Effective services for children and families (Open University Press, Buckingham, 2002) at 247-288, the children discussed their experiences of being in care and identified the resulting social exclusion. Secondly, with 34% of a study involving 141 young people not wanting others to know they were in out-of-home care ME Courtney and others “Foster youth transitions to adulthood: A longitudinal view of youth leaving care” (2001) 80(6) Child Welfare 665-717 and one New Zealand study where those interviewed were late adolescents or adults who had been in care. This was of 4 interviewees, three of whom referred to the experience of being in care as negative, M Turnbull Adults who grew up in state foster care (unpublished report, Children’s Issue Centre, Dunedin, 1997). Yates, above n 828, at 38, places this into the context also of drift in care, with time in limbo, following a series of caregivers and placement breakdowns.
1149 Hearing social workers make this assertion is my experience over many years practising as a barrister in the Family Court. See also Smith, above n 523, at 126, suggests this is a strong reason for obtaining orders. She refers to a child’s need for belonging often being unmet despite experiencing a successful foster placement, and opines that what is critical is the need for a connection with birth parents, siblings or extended family.
1150 For example, see Atwool “above n 52. Atwool interviewed 47 children and people for the study undertaken by the Children's Commissioner on the provision of care services for children in care. Of that group, that “[N]ine participants (19%) talked of being treated unfairly and of being stigmatized as ‘CYF kids’ and being
sometimes report that the children in their care feel “labelled and stigmatised, and are acutely aware of being different”\textsuperscript{1151} when asked by their peers why they did not live with their own families.

\textbf{11.11.2 Is subjective permanency sufficient?}

If the subjective psychological perception of permanence is fundamental, with the child feeling secure in his placement, and it is a premise of this thesis that it is, then it matters not whether permanency is secured by the making of formal orders in respect of the child. I nonetheless accept that in many instances the fact of there being orders may positively influence the child’s subjective sense of permanency. This is a perfectly proper consideration to have regard to. However, it is illogical to assert that by virtue of there being discharge of the CYPF orders and the making of COCA orders in their place means that permanency as a totality is achieved.\textsuperscript{1152} The change of status from public care to private care itself means nothing\textsuperscript{1153} and if it was the magical panacea then orders would follow from the moment the child was taken into care of the Chief Executive. Reference has previously been made to Schofield and Beek’s assertion that there must be a “permanence mindset”\textsuperscript{1154} and the commitment that must be made to the child to feel secure in her new family with this being illustrated through to independence.\textsuperscript{1155}

reminded that they were an outsider.” On the other hand, seven (15\%) said there was nothing bad about being in care when asked that question.
\textsuperscript{1151} Atwool, above n 52, at 141.

\textsuperscript{1152} This writer made a request to MSD for statistics as to the number of permanent placements (post the making of COCA orders) that had broken down. Advice was given that those statistics were not available. The answer was couched in terms of the 2010 permanency policy (CYPF 2010): “The Home for Life data only started being recorded October last year and they would not have any data available at this stage. They say that they will need at least one to two years of data to start investigating any trends regarding re-entry into care. The best CYF could do would be to identify those who came into care within a certain time period of being discharged from care then manually check each one to see if they had been a permanent placement, as opposed to say a discharge of orders to parents etc. That would involve quite some manual work.” (Email advice from the Chief Legal Advisor to this writer dated 26 September 2010.) However, it can be noted that in 2011, former clients of mine sought my assistance as the placement of a child with them had irretrievably broken down (and where COCA orders had been made). The Chief Executive had to make application for a s 78 order to assume custodial status. Apocryphally one has heard of a number of other placements that have failed.

\textsuperscript{1153} Atwool, above n 725; Atwool and Gunn, above n 506.

\textsuperscript{1154} Schofield and Beek, above n 515, at 4.

\textsuperscript{1155} Emphasis can be given to the comments of both Sinclair above, n 1012 and 1047, and Thomas above, n 1048 as to the desired permanency paradigms that must be established to successfully achieve permanency for the child.
11.12 The adoption/foster care dichotomy

Tilbury and Osmond assert that there are three aspects to permanency, the third of which is legal status "officially determined by the child welfare system,"\textsuperscript{1156} but otherwise do not further discuss the issue. In respect of placement, this is considered primarily as being by way of adoption or foster care. The former provides legal security for the child and his or her new caregivers.\textsuperscript{1157} In New Zealand, the preferred vehicle for permanency is by way of foster parents who care for the child either under the auspice of the Chief Executive who has custody or by their obtaining parenting orders under COCA. There is no certainty, such as is conveyed by an adoption order, by the making of orders under COCA. The question canvassed here concerns the research that is available in respect of each about which offers the greatest sense of security for the permanently placed child.

11.12.1 Perceptions of permanence – adoption and foster care

A recent English study\textsuperscript{1158} considered the differences that exist between long-term foster care and adoption and concluded that adoption is narrowly perceived as the more stable care option. Three groups of permanently placed children were compared: those adopted by strangers, those adopted by caregivers, and those in long-term foster care. The study asked, firstly, how could emotional and legal security be provided to these groups of children, thereby providing a sense of permanence and positive outcomes? Secondly, how successful were the two frameworks in providing security and permanence and in promoting positive outcomes? There were both advantages and disadvantages attaching to each group. Notwithstanding that it may not provide legal security, long-term foster care could provide children with both emotional security and a sense of permanence. Within the English context, the study supported adoption by caregivers, noting that this offered older placed children a chance of adoption and "hence legal as well as emotional security which they might not otherwise have had."\textsuperscript{1159} The children had formed attachments to their caregivers and expressed relief in achieving the security of adoption. The key issue was the perception

\textsuperscript{1156} Tilbury and Osmond, above n 1015, at 267.
\textsuperscript{1157} See s 16 of the Adoption Act 1955 which prescribes the effect of a final adoption order once made (s 16) and particularly s 20 which provides that before any application is made for the discharge or variation of an adoption order the prior approval of the Attorney-General is required. The section also provides quite limited grounds upon which discharge or variation can occur. Biehal and others, above n 837.
\textsuperscript{1158} Biehal and others, above.
\textsuperscript{1159} Biehal and others, at 270.
of permanence, similar to the observation made by Lahti. Biehal’s study placed emphasis on the additional sense of belonging and stability that can be felt by later-placed children who are adopted by the carers, giving as an example, two children who had been placed with their adoptive families at the age of five and subsequently expressing great relief as a 16 year old and a nine year old respectively at having achieved the legal security of adoption. For those two children, legal security gave greater emotional security. The essential factors in effecting permanency were timely decision making and timely planning.

This finding, that adopted children have a greater sense of security than those who are not and who remain in long-term foster placements, was noted as well by Triseliotis and Rushton. Biehal refers to the “perceptions that children have being “intimately connected with issues of identity, attachment and family loyalty.” Thus, there will be a variety of causal factors that apply as opposed to the simple fact of adoption as a legal precept in comparison to other legal frameworks that are not of the same legal effect. A sense of permanency may be imparted to the child in foster care as well as to a child by adoption and equally may be absent in adoption or in other situations. Biehal’s study compared the sense of belonging and permanence between children who were adopted from care and those in long term foster situations. It reiterated the observation that “perception of permanence is key” and concluded that a child’s sense of belonging comes from relationships and not the legal framework that is used. In doing so the study observed that both timely decision making and timely entry into care were essential. This reflects the accepted phenomenon that the older a child is at the time of his or her entry into care and the longer that a child spends in care (and irrespective of the age of the child when he or she entered care) the more difficult it is to find a stable and secure permanent placement. The study supported care

1160 Lahti, above n 1015.
1161 At 208. This specific example was noted by Caroline Thomas Adoption for looked after children: messages from research: an overview of the adoption research initiative (British Association for Adoption and Poverty, London, 2013) at 24.
1162 Delay in decision making and in planning for permanency is the bane of those attempting to secure permanency. This can be caused by unsuccessful attempts at reunification with birth family, too lengthy a search for kin caregivers, and delay caused by the Court system. See for example, Atwool, above n 725; Atwool, above n 52; Biehal and others, above, n 837 at 269.
1163 Triseliotis, above n 515.
1165 Biehal and others, at 19.
1166 Biehal and others, above n 83, at 269, noting Lahti’s 1982 study.
1167 Biehal and others at 269.
adoption (from foster care) being encouraged as caregivers had formed a strong bond prior to the adoption and some of the children were pleased to have the security of adoption. However, the study noted that it was disappointing that adopted children were doing no better than those in foster care and both groups were more likely to have mental health difficulties than the overall child cohort.

Lahti’s (1982) outcome study found that the perception of permanence was important. Legal status was not as important for either the children or their caregivers as the perception of permanence: having a formal status, whether that was adoption or being fostered (i.e. within the care system) was the key to improvement in child well-being. Thus:

Where placements were seen as permanent by the parents, the child’s well-being scores tended to be higher. A sense of permanence was not necessarily related to the legal permanence of the placement. Perception of permanence occurred even without legal sanction and it was absent even when legal sanctions were there....whether the child was in legally permanent placement, in adoption, returned home, or in legally temporary foster care made little difference in his level of well-being at the time of interview. Perception of permanence was the key.

Lahti went on: "What characterizes the understanding of permanence for each family is not clear." The essential aspect was that the perception of permanence in accounting for the child’s well-being was clear. This underscores the need for providing continuity in the child’s life in a home that is likely to endure.

11.12.2 Outcomes

The comparative research on the benefits (better outcomes) of adoption as opposed to foster care is ambivalent, as there is a relative dearth of research on the specific point of ascertaining the perceptions of a child’s sense of belonging and permanence. 1174 Barth and

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1168 Biehal and others at 270. Equally, however, the authors note that “many of the children in stable foster placements seemed to feel emotionally secure in their placements and considered them to be their permanent home.”
1169 Biehal and others, above, n 837 at 270.
1170 Lahti, above n 1015. This was an American study.
1171 Lahti at 567 – 568.
1172 Lahti at 568.
1173 Lahti at 568.
1174 Triseliotis, above n 515. Note also Atwool, above n 52, in this respect at 32-44 where there is an extensive discussion about the views of children about being in care.
Lloyd comment that “Global studies” have considered the outcomes of either adoption or foster care but have not compared the two.\textsuperscript{1175} That same study noted that adoption was:\textsuperscript{1176}

… associated with the most similar and, generally, positive outcomes. Children in foster care had the poorest development on many measures … The findings … suggest that placement and parental commitment are major forces in development”.

Atwool observes that even where a child has had a positive foster care experience, the transition into care is difficult and subsequent changes of care more so.\textsuperscript{1177} Of particular concern is the situation of those children who have not been able to form relationships with caregivers in a new family who refer to being rushed into leaving care before they are ready or are abandoned. They may have been removed at an older age or spent longer in care.\textsuperscript{1178} In contrast to those who are placed in new families and later make the transition to independent living “these young people are very alone”.\textsuperscript{1179}

Fernandez’ longitudinal Australian study focused on a group of children who retained a birth family connection but who could not return home and where permanent foster care or adoption was the goal.\textsuperscript{1180} This noted that many children experienced placement instability, notably early in their care history, with this being accompanied by changes of school, and disrupted adult and peer attachments. The “clinically significant” finding was that “greater cohesion with carers was associated with a stronger repertoire of pro-social behaviours, better self esteem and emotional and behavioural development outcomes.”\textsuperscript{1181} Where children in care had good foster-parent relationships in earlier placements (or the teaching of such skills) the more likely they would develop later cohesive relationships. Rushton and Dance, in their

\footnotesize\begin{itemize}
\item \textsuperscript{1175} Richard P Barth and Christopher Lloyd “Five Year Developmental Outcomes for Young Children Remaining in Foster Care, Returned Home, Adopted” in \textit{How does Foster Care work? International Evidence on Outcomes}, above n 26.
\item \textsuperscript{1176} At 60.
\item \textsuperscript{1177} Atwool, above n 52, at 38
\item \textsuperscript{1178} Caroline Thomas, above n 1162, refers to a number of other reasons why delay may occur: obtaining expert opinions, (notwithstanding that having the view of an expert could assist in decision making, but with concern being expressed at delay arising through assessment of the birth parents and their capacity to parent) and delay in court processes, including delay in social workers not beginning the search for placement until a decision was made by the court that return was not a possibility. In the New Zealand context, significant delay arises, particularly for Māori children due to the need to find a whānau, hapū or iwi placement before a non-kin-placement can be sought and, delay in finding safe kin –placements before exploring non-kin options. See Chapter Eight above for a discussion about the competing considerations at play.
\item \textsuperscript{1179} Atwool, above n 52, at 42.
\item \textsuperscript{1180} Elizabeth Fernandez “Growing Up in Care: An Australian Longitudinal Study of Outcomes” in \textit{How does Foster Care work? International Evidence on Outcomes}, above n 26.
\item \textsuperscript{1181} At 291.
\end{itemize}
prospective late adoption study, noted that although such adoptions were of clear benefit - as over half of the study participants made good progress in their new homes - some of the placements carried too high a level of problems for them to be sustained. They concluded that “establishing a legally secure and consistent family environment is not sufficient by itself to ameliorate problems for all children.”\(^\text{1182}\) Barth and Lloyd conclude that adoption (and returning home) were associated with the most similar and positive outcomes, in contrast to children in foster care. Nonetheless, their findings suggest that “placement stability and parental commitment are major forces in development.”\(^\text{1183}\)

Adoption, of course, does involve a distinct legal framework. Triseliotis endorsed adoption as the preferred option for effecting permanence because it provides certainty through its legal consequences.\(^\text{1184}\) However, this is not universal for all children who will not be able to be returned to their birth families. There may be children (older) who do not want to be adopted, and these children, though not able to return to their birth parents, may nonetheless have a high level of involvement with them.\(^\text{1185}\) Sinclair suggested that adoption appeared to be the most secure care option, with most adopted children being young, feeling like they belonged in the new family and were not subject to pressures from their birth families. Older children tended to be fostered and although most seemed to be settled, others saw this care option as abnormal and some had ambivalent relationships with their birth families. In this study, children aged under 11 years were likely to remain with their foster caregivers but the risks of placement collapse were greater for those over that age. Importantly, the “psychological acceptance of foster care was at odds with its frequent transience” as a large minority of the children (over 40 per cent) wanted to stay with their foster parents beyond their turning 18 years, but only 10 per cent of those aged over 18 were with their former foster parents.\(^\text{1186}\) This study found that children who were “longer-staying” [in foster care] faced a dilemma: foster care did not offer a “secure family for life” and most who left foster


\(^\text{1183}\) Barth and Lloyd, above n 1176, at 60.

\(^\text{1184}\) As a reminder, the severance of the legal relationship between the child and his or her birth parents and the significant restrictions on being to challenge a final order for adoption.

\(^\text{1185}\) Triseliotis, above n 515.

\(^\text{1186}\) A summary of research undertaken by I Sinclair and others, above n 1047, in Sinclair Fostering Now: Messages from Research, above n 1047, at 156. This involved an extensive study undertaken in York. There were 596 children who were interviewed in 1998 and 2001.
care went back to their parents or into independent living, and irrespective of the outcome, they did not do well.\footnote{At 157.} Outcomes however, were dependent on the personal characteristics of the children and the quality of the caring relationship.\footnote{Fernandez and Barth, above n 26.} This outcome was confirmed by Sinclair in “What Makes Foster Care Effective” where, on reflecting on previous studies which looked at the outcomes for children on leaving care (going home, being adopted and moving to independent living), observed that it was difficult to show that subsequent success depended on the type of placement experienced by the child.\footnote{Sinclair, above, at n 45, at 197-198.} Importantly, a reason for “doubting the proposition that foster care cannot achieve long-term change … is that the foster children themselves do not think so.”\footnote{Sinclair at 199.} Just over 50 per cent of the children who responded (and were living independently) agreed with the statement that “I got a lot out of foster care”, with the balance being more or less equally split between those who agreed and those who did not.\footnote{Sinclair at 199-200.}

11.12.3 Ambiguity in perception

Atwool cites Bush and Goldman\footnote{(1992). I have not been able to locate this.} who suggest that some children are able to tolerate a degree of ambiguity in their relationships with caregivers in order to preserve their relationship with their birth families, it being the quality of the relationship that is most important. Although children in care want stability in the placement, they did not want, in the Bush and Goldman study, to be adopted. This would have meant being taken away from parents to whom they still felt attached and the destruction of the very strong sense of identity they had with their families.\footnote{Atwool, above n 52} Reference has been made above to Atwool’s study and her discussion concerning the stigma of being in care. However, this appears not to have been translated, at least explicitly, into a conclusion that a child in long-term foster care or permanently placed, needs to have a status other than that of being a child in care. The study by McCauley that Atwool refers to should, however, be noted: this saw 16 young people interviewed (between 16 and 24 years) about what they wanted for their own children. All stated they did not want them taken into care (and this was irrespective of whether their own experiences of being in care were good or bad). The point here was the “depth of feeling not
evident elsewhere in the interview” with it being “suggested that this provided a rare glimpse of the anger they felt about their life situation.”\footnote{299} The study by Sanchez, who conducted a review of the perspectives of youth in foster care regarding permanency, has been noted earlier in this chapter.\footnote{1194} In contrast, a study conducted by Landsman, Malone, Tyler, Black and Groza found that ‘permanency’ was multi-faceted for young people and encompassed not only “legal status but also placement stability, relationships with family and important adults, preparing this for adulthood, and emotional health.”\footnote{1196}

Sinclair suggests that in examining the outcomes of care there has been a misdirected emphasis, firstly “in looking for the wrong kind of change” noting as many adoptive parents know, that it is not realistic to expect that children in care “with such handicaps to lose their scars,”\footnote{1197} secondly, that the measures of foster care are of sympathetic and authoritative parenting which may be a factor in getting good outcomes but must be in parallel with other matters - an interest in education and attending a good school, and, thirdly, foster care may only bring positive change when the conditions are right. Foster children may learn about positive attributes such as “love or the value of education” but the “troubled families, lonely flats or dead end jobs for which many leave do not give them the chance to show what they have learnt. Later life might be more kind.”\footnote{1198} This acknowledges the reality that permanently placed children present with issues that are complex, demanding and often expensive.\footnote{1199}

Schofield and Beek, in their important study on the importance of establishing for children in care a secure attachment relationship with caregivers, reported that family membership is not seen as necessitating orders being made in favour of the caregivers. Rather, what is emphasised is the need through words and actions of the caregivers to place the child within the family through total immersion of the child in the life and routines of the family.\footnote{1200} Sinclair opines that there are two goals to be sought: high quality placements which are important in their own right and likely to be necessary for future success even though this

\footnotetext{1194}{Atwood at 41.}
\footnotetext{1195}{Sanchez above n 1045.}
\footnotetext{1196}{(1999), also cited in Freundlich above at 744.}
\footnotetext{1197}{Sinclair, above n 45, at 200.}
\footnotetext{1198}{At 200.}
\footnotetext{1199}{Schofield and Beek, above n 515, at 65.}
\footnotetext{1200}{Providing a secure base: outline of an attachment based model of foster parenting.}
may not be guaranteed, and to take “very seriously” the problems in the new placement (irrespective of the legal framework) that may exist for the child. “It should be possible to ensure that children do not go to environments where they have very little chance, that any risks are calculated ones and that the transitions are well handled.”

Clearly, it cannot be said with sufficient certainty, and as a matter of absolute logic that in order to effect permanency for a child, private law orders are a prerequisite. Permanency has a variety of meanings and contexts on a number of levels depending on the specific case and its specific facts, with the critical dynamic being the nature and quality of the relationship between the child and his caregivers. Rather than proceeding on the basis of a mantra and a one approach fits all policy, the Chief Executive needs to examine what the specific child in his or her specific circumstances requires, (and, as discussed in Chapter Twelve, with this possibly involving the provision of support over a lengthy period). In some situations this could involve use of adoption as the appropriate legal framework given the enhanced legal security of an adoption. A very recent English review suggests that both adoption and COCA can provide children with security and permanence and that those children in stable long-term foster care did as well as those who had been adopted when it came to emotional and behavioural issues. One area of difference, the lower disruption rate for children who had been adopted than those in foster care could be explained in terms of the children being younger when placed with their caregivers, as opposed to the nature of the framework supporting the placement. A direct comparison between adoption and foster care is not possible as the characteristics of the children involved in adoptions and foster placements are different and there are few studies that measure the outcome of adoption in adulthood. However, where this has occurred, “most studies of adopted children’s sense of belonging and identity are based on samples of adults adopted long ago.”

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1201 Sinclair, above n 45, at 200.
1202 Reframing this for present purposes as foster care.
1203 Caroline Thomas, above n 1162, at 81. The author notes that the findings are consistent with those of Sinclair’s study, reported in The Pursuit of Permanence, above n 1013, that there was little difference between adopted children and others, although the differences noted tended to favour adoption.
1204 Caroline Thomas, above at 81.
1205 David Howe and Julia Feast Adoption, search and reunion: the long-term experience of adopted adults (The Children’s Society, London, 2000), cited by Biehal and others, above n 837, at 19; Triseliotis, above n 515.
11.13 Conclusion

Fundamental to a successful permanent placement is the creation of a new permanent family with the ultimate goal of finding the child a placement that will be nurturing (being one in where they the opportunity to form a secure attachment to their new caregivers) and capable of dealing with the child’s dual legacy. That must be a high quality placement and needs to be supported by the State to the extent necessary, to see the child grow and develop into an independent adult, who in turn may become a parent and whose children will not themselves be taken into care. That social work support needs to be of high quality as it will be experienced by the caregivers as a “net which is only as strong as its weakest link.” Further, much will depend on specific factors pertaining to the child and his or individual circumstances: how old was the child when entering care? What was the nature and extent of the neglect or abuse that the child experienced and which resulted in intervention? What was that child’s experience of being in care – how many placements were there and over what period of time did those placements occur? What therapeutic intervention is required for the child in order to address those care and protection and care legacies? Was that intervention provided?

The issues are of course inter-related and lie at the heart of the process of selection and matching that must be undertaken. A successful placement will therefore have been the product of good permanency planning – which will have occurred as part of the child’s journey through care. This will of necessity include consideration of whether the permanent placement is to be secured by the making of orders under private law or whether the legal framework should continue to be under the Act and remain one of public law – with the consequences that follow? The Chief Executive now proceeds on the basis of COCA orders being obtained in almost every instance of permanence. The Home for Life Policy certainly operates on that premise. In so doing, the Chief Executive runs the risk of

1206 Elaine Farmer, Sue Moyers and Jo Lipscombe “Fostering Adolescents” in Ian Sinclair Fostering Now: Messages from Research, above n 1047, at 133.
1207 Primarily the need for on-going reviews of the custody order (and any other orders that may be in place and which also must be reviewed.
1208 It is this writer’s experience of acting in this area as lawyer for children that this is the case irrespective of the circumstances of the case: there have been occasions when it is proposed that parenting orders be taken under COCA when the young person is on the cusp of being 16 years (or is 16 years) of age; unless there are exceptional circumstances parenting orders cannot be made in respect of such children.
1209 Bennett, above n 43. However, see the discussion in Chapter 13 relating to possible changes to be effected by the Vulnerable Children Bill.
allowing policy fiat to dictate what is going to occur. Such an outcome may well be contrary to the welfare and best interests of the child in any given instance, given the research which has been noted in this chapter. It is my view that the preferred course of action is to allow for discrete assessment in each case so that the legal framework can be tailored to meet the needs of each permanently placed child – having regard to the totality of the child’s history and to the circumstances of the new placement, which will also factor into account matters such as the contact the child is having (or not) with the birth family. Whether this involves the caregivers assuming COCA orders will have regard to the specific history of the child and the nature and extent to which the child has developed a perception of permanence that is real to him or her.

The next chapter considers the important question of how permanently placed children can be supported.
CHAPTER TWELVE

POST-PERMANENCY SUPPORTS

12.1 Introduction

Children who come into the care of the State usually have a greater range of needs (developmental and educational delay, chronic medical conditions and mental health issues,\(^\text{1210}\)) than children who do not. Suicide rates are higher in this group than in the wider community.\(^\text{1211}\) They present as a high risk, special needs population who must overcome barriers to obtain optimum health care.\(^\text{1212}\) It is essential that there is a partnership between those legally responsible for their care and the medical and health professionals who work with the child.\(^\text{1213}\)

This chapter examines the situation for children and their new families once ‘legal’ permanency occurs.\(^\text{1214}\) It considers how the State, through CYFS, makes provision for ensuring that, firstly, the new family is protected against future legal challenge by the birth

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1210 Tarren-Sweeney and Hazell, above, n 515.
1211 Chief Executives of Ministries of Social Development, Health, Education, and Justice and the Department of Building and Housing Briefing to the Incoming Minister, Social Sector Forum, above n 515, at 9. The Chief Executives noted at 8 that issues for vulnerable families (a more general group whose children may not be in care), problems interact and compound to undermine healthy development, giving the examples that children of teenage parents are more likely to be raised in hardship and have lower education and lower incomes and to become teenage parents themselves and young people from such deprived backgrounds are more likely to have significant behavioural problems which are a precursor to late issues that will affect them as adults – crime, anti-social behaviour, suicidal ideation, inter-partner violence and poor physical health.
1212 Children in care also have significant barriers to good health care. The issues will vary according to the age of the child at the time of coming into care. These can include “risk factors arising from poverty, prenatal exposure to drugs or alcohol, or parental mental illness, but also due to inadequate medical supervision before coming into care … poor hygiene, under-immunization records, dental neglect and contraceptive needs for adolescents.” Canadian Paediatric Society, Community Paediatrics Committee, Position Statement “Special considerations for the health supervision of children and youth in foster care” (2008) 12(2) Paediatrics and Child Health 129-132 at 130.
1213 This is now recognised in New Zealand as being an issue and steps have been taken to address health issues for children in care by their undergoing a ‘Gateway Assessment.’ This was an initiative announced in the 2011 Budget as part of the ‘Services for children in care package.” It is an interagency project between CYPF, the Ministry of Health and the Ministry of Education. Every child who is the subject of an order placing that child in the custody of the Chief Executive or is referred to a family group conference is to undergo a health/educational assessment. It is intended to provide a “complete picture of the child or young person’s needs … they get access to the right health and education services to address their needs.” Department of Child Youth and Family Interagency guide to Gateway Assessments (Department of Child Youth and Family, Wellington, 2011) at 9.
1214 Occurring when the caregivers of the children have had COCA orders for day-to-day care and guardianship made in their favour.
parents by making a commitment to meet their legal costs and, secondly, in addressing, to the extent necessary, the care and protection and/or care legacies of the child. At the same time, the Chief Executive has, since 2006, implemented specific policy initiatives, most recently the ‘Home for Life’ policy in 2010, which have been (it is said) designed to provide precisely this assistance to the permanently placed child and those caring for them. A related issue is how should that support be delivered? The Act contains specific provisions which are available for this in the form of services (in particular) and support orders. The chapter critically examines the interplay between the Act and the policy and considers the rhetoric of Ministers and policy makers on this question in the context of respect for the welfare and best interests of the child in question – and with the overlay of Articles 9.3, 18.2 and 20 of UNCROC.

### 12.2 Does legal permanency mean that care and protection issues disappear?

It is the experience of certain New Zealand commentators that social workers often express the view that once children have been permanently placed in a new home, and their caregivers have taken orders under COCA, that the child is no longer in need of care and protection. It is not clear whether the assertion is a personal statement by those social workers or whether what is being said is a reflection of a more formal CYFS site, regional or national perspective. Irrespective, this is a remarkably facile observation given the abuse and neglect that children who have been permanently placed have experienced when in their birth families or later in care. It is reasonable to expect that social workers who have been at the forefront of working with children who have experienced significant trauma would be alert to the continuing needs of these children. The reality of those dual legacies either being present or subsequently manifesting themselves was something “all too often given lip-service only”. Atwool and Gunn repeat the prescient point that:

> Achieving permanency is not simply about moving cases from one piece of legislation to another. For statutory social workers it may signal the end of their involvement in a

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1215 Noting that COCA orders cannot provide objective security to that new family.
1216 Atwool, above n 725; Atwool and Gunn, above n 506. As noted, the care legacy represents the outstanding psychological, educational and related issues that are necessarily consequential to that background of neglect and/or abuse, and of drift in care including in this respect the reality of multiple care placements. See Cooke above n 34; Cooke and Lindsay, above n 35; This also my personal experience in many cases.
1217 Atwool, above n 725; Atwool and Gunn, above; Cooke above; Allan Cooke Child Protection: New Zealand’s Experience of Promoting Permanency without Adoption (in press, Routledge); Inglis, above n 183.
1218 Cooke above, n 34.
1219 Atwool and Gunn, above n 506.
particular child’s life but for the caregivers the decision to commit to permanent placement is only the beginning.

The assertion that once orders under COCA have been made means an end to the involvement of the Chief Executive has also been rejected by the Family Court: 1220

The key to the problem is a mistaken view that the Service’s responsibility for a child ends where, as here, a safe and permanent placement for the child has been found. … Of course the Service’s responsibility does not cease then, for it is responsible for ensuring that the child’s care and protection are maintained. … But other aspects of the need for care and protection remain, for to ensure the child’s continued care and protection the placement itself needs to be protected from destabilisation, for destabilisation of the placement necessarily involves destabilisation of the child.

That an ongoing responsibility remains was accepted by the Chief Executive with the 2006 ‘Children and Young People in Care: A User’s Guide to the Permanency Policy’ where it was stated: 1221

The Chief Executive has a responsibility to ensure the child’s … on-going needs are met that relate to why they were in need of care and protection. This responsibility does not end when the caregivers assume legal responsibility.

This was necessary given the purpose of permanency: “to ensure a positive outcome for the child or young person as they grow up and arrive at adulthood.” 1222

The Ministerial statement accompanying the 2010 Home for Life policy recognised that children who have been abused and neglected had suffered: 1223

…harm that is substantial and long lasting. The social and economic costs are beyond comprehension. … Children beaten and sexually abused grow up carrying the burden of that abuse. Many driven by anger, low self esteem and distrustful of others, follow a path to crime and violence and many repeat their experience on the next generation. The neglected child is a silent timebomb. Left alone, unwashed and unloved this child may

1220 F v D-GSW [1999] NZFLR 351 at 357. The issue in that case was the provision of funding for legal services following discharge of the CE’s orders and the making of orders in favour of the caregivers. The CE did not want to fund that cost. The Court held otherwise.

1221 Department of Child, Youth and Family, above n 63, at 17.

1222 At 17.

1223 Bennett, above n 43, at 2.
not be physically bruised or injured but will be deeply affected and is unlikely to grow into a healthy, loving individual who is a productive member of the community unless we step into help.

However, the policy that was then introduced did not provide a system of support that reflects the profound concern expressed.

12.3 The Chief Executive and the duty to support

The responsibility of the State to children is emphasised in the Long Title to the Act which, in part summarised, is an Act to advance the wellbeing of families and the wellbeing of children and to make provision for matters relating to children who are in need of care.\(^{1224}\) This clearly includes permanently placed children. The Act casts quite specific obligations on the Chief Executive, notwithstanding that this is expressed subjectively, when exercising both statutory and administrative powers.\(^{1225}\) Section 7(1) requires the Chief Executive to take positive and prompt action to ensure that the objects of the Act are attained and for this to occur consistently with the objects of the Act as set out in s 4 and to the principles set out in ss 5, and 6.\(^{1226}\) In respect of supports that are to be provided there is, in addition to the general duty found in s 7(1), the more discrete and specific duties set out in s 7(2)(b)(i),(ii) and (2)(c)(iii) and (iv). Section 7(2)(b)(i) refers to the duty to promote the establishment of services,\(^{1227}\) designed to advance the welfare of children both in the community and in the home\(^{1228}\) and s 7(2)(b)(ii) refers to the adoption of policies\(^{1229}\) that are (both) designed to provide assistance to children who lack adequate parental care, require protection from harm or need accommodation or social or recreational activities. Section 7(2)(c)(ii), (iii) and (iv) also must be noted. The first refers to the need to ensure that policies and services have particular regard for the values, culture and beliefs of Māori, the second to support the role of

\(^{1224}\) Barry MacLean “State Responsibility to Children in Need of Care” (Lexis Nexis, Professional Development Child Law Conference, 2002). Section 5 requires the establishment, and adoption (which must include ‘implementing’) of services and policies designed to provide assistance to children who are in need of care and protection. Section 6 is the “overarching provision” which contains the statutory mandate that “in all matters relating to the administration or implementation of the CYPF Act … the welfare and best interests of the child should be the first and paramount consideration.” See B (CA) 204/97) v DSW (1998) 16 FRNZ 522 at 525 where the Court of Appeal stated that: “We do not regard the Act as conflicting with any international norms, nor specifically with the Convention. The Act reflected the way in which the New Zealand Parliament has given effect to the Convention.”

\(^{1225}\) “…as will in the Chief Executive’s opinion best ensure…”

\(^{1226}\) Coyle, above n 696.

\(^{1227}\) Including social work services, family support services, and community services.

\(^{1228}\) With the latter by inference including children who are placed in new homes.

\(^{1229}\) Including financial support to parents, families and family groups
families, and family groups,\textsuperscript{1230} and the third to avoid the alienation of children from their family, whānau, iwi, hapū and family group. Then there is s 7(2)(f): the duty to ensure that those providing services under the CYPF Act receive adequate training and comply with appropriate standards.\textsuperscript{1231} These various obligations appear not to have been generally given much emphasis by social workers.\textsuperscript{1232}

\textbf{12.3.1 UNCROC}

There is a tension between the duty of the Chief Executive in bringing about a ‘home for life’\textsuperscript{1233} for children and the obligations that exist under UNCROC to support those children.\textsuperscript{1234} The Chief Executive must have regard to Article 3 of UNCROC which requires contracting States Parties in “all actions concerning children, whether undertaken by public ... welfare institutions, administrative authorities ..., the best interests of the child shall be a primary consideration."\textsuperscript{1235} When a child is removed from his or her family, there then arises the complementary right of that child of having the opportunity for a placement in a new family being met and recognised by the legal authorities of the State in which they live. This is reflected by the permanency decision. It is then necessary to look at Article 20, requiring states to provide special care and assistance. This goes beyond the provision of alternative care — a child has the right to security of placement and the provision of services to assist in that and in addressing the consequences of their care and protection history. Article 18(2) is important in this context: it requires states to render appropriate assistance to parents and guardians in the performance of child-rearing responsibilities and to ensure the development

\textsuperscript{1230} And embracing here whānau, hapū and iwi.
\textsuperscript{1231} See Brown, above n 168, at 52, where the comment is made about how social workers are over worked and subject to criticism from the public and media to such an extent that it can be asked how they manage to retain any sense of either integrity or dignity. The further observation is then made that it is not a surprise that social workers do not stay long in the job, tending to be in the job for only 2 years before moving on. As at 2000 only 44\% of frontline social workers and only 55\% of new social workers had even the “B” level social work diploma.
\textsuperscript{1232} MacLean, above n 1225, at 2. In part this is a practitioner’s perspective (Barry MacLean is a very experienced family law barrister practising in Auckland for many years). Here he refers back to the Brown Report, above n 168, and the observation there at 52: “There has been a litany of examples of social workers being unavailable, failing to comply with legal or agreed timeframes, dropping children off at new placements and having no contact until a crisis occurred. Families felt like they had been treated with a serious lack of respect, judges were extremely concerned by the quality of work presented to them and agency staff were frustrated in their efforts to work together.”
\textsuperscript{1233} ‘Home for life’ in this respect is used in two distinct ways: firstly, to describe the fact of finding for the child a home in which that child will be sustained through to independence and beyond and secondly, the specific support package now provided by CYPF for families who have taken on children in State care.
\textsuperscript{1234} Coyle, above n 656; Susan Smith, above n 523, at 126.
\textsuperscript{1235} Coyle, above; MacLean, above.
of institutions, facilities and services for children. This was recognised by Judge Moss in *Menzies v Ministry of Social Development*. 1236

[8] The need for services arises from the State of needing care and protection. T's state is not one of a transitional care and protection need, where he briefly has intervention from the State and is then returned to his own family of origin. Rather, from birth it was clear that he would not be able to be in his mother's care, and he was therefore placed with the experienced, talented caregivers whose commitment to him has sustained him through a difficult infancy, and committed to him permanently.

[9] His [the child in question] care and protection needs continue, and will continue until he is no longer subject to the Children, Young Persons and Their Families Act. That is not because his guardians lack for any skills or commitment. Rather, it is a continuing state because T's own family cannot care for him. Nor is it an adverse label, to be in need of care and protection. Rather, it is a recognition of the state's responsibility to children whose parents cannot whether permanently or temporarily fulfil that responsibility. This special status is recognised in the UN Conventions of the Rights of the Child by article 20. That article provides (by para 1) as follows:

“1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.”

[10] The special assistance which this child is entitled to is on-going foster care. That does not, however, enable the State to delegate completely the obligations which the State has to this child, arising from the deficits of his parents.

1236 *Menzies v Ministry of Social Development*, above n 581.
These decisions of the Chief Executive do not occur in a vacuum: There are financial constraints faced by CYFS. This was acknowledged in *PFMB v JJB and Chief Executive*\(^\text{1237}\) where it was acknowledged that there was a need for fiscal restraint in the current climate:\(^\text{1238}\)

… but children have rights both in terms of the CYPF Act itself and in terms of New Zealand's international obligations under UNCROC and in particular Articles 9, 19, 20, 24, 25 and 27 which requires the State to provide special assistance to children in care. Where the State seeks to abrogate or water down its international obligations, the Courts, in my view, have an important role in ensuring the State and society at large continues to adhere to and comply with our international obligations.

### 12.4 The need for post-permanency supports

Fundamental to the question of permanency is that of the support structure that will be implemented once a child has been permanently placed and COCA orders made, reflecting the reality that the great majority of children who are permanently placed in new families are those who have suffered the most profound abuse and neglect.\(^\text{1239}\) Conceptually important here is the need for those working with the permanently placed child and the family to have that child and family as their particular focus. That child has been removed from their birth family which has failed to provide adequate care during the years of childhood/adolescence leading to removal. The new family that has been selected has the potential to meet the current and identified needs of the child. Social work practice must be centred on ensuring that this family is the primary source of nurture and security for the child. Should issues arise for the child and/or that family, the question becomes that of how to sustain that family (and the placement)?\(^\text{1240}\) This immediately implies that the process of selecting the new family

\(^{1237}\) *PFMB v JJB and Chief Executive* [2012] NZFC 4689.

\(^{1238}\) At [10].

\(^{1239}\) For a recent and useful summary of the needs of the permanently placed child see Atwool and Gunn, above n 506, at 15-24; Coyle, above n 656, at 46, who refers to there being a “pursuit of orders under COCA.” Coyle argues that this firstly ignores the reasons why children come into care in the first place and the manifestation, either in the short or long term, of any consequent psychological issues that may arise, and second, that those children in care whose parents have mental health/drug issues are particularly vulnerable to the irrational behaviours of their birth parents — as are their caregivers. In such cases the continuing role of the Chief Executive as a “buffer” is often required.

\(^{1240}\) Schofield and Beek, above n 515. The authors immediately acknowledge that unsatisfactory/unsafe placements should not be sustained. (This however, can only apply in the sense that the Chief Executive can remove a child from such a placement prior to COCA orders being made. After that event has occurred to effect removal would necessitate the filing of proceedings under the Act.)
may not have been as thorough as it could have been and/or that an appropriate structure of future support is not in place.  

“Children in care … present with exceptionally poor mental health, with more than half of the boys and girls reported as having clinically significant psychiatric disturbances.” The behavioural problems that are presented by them are higher than their same-age peers or those peers with similar backgrounds of ill-treatment and neglect. This is connected with placement breakdown.  

This was more so with older children – reflecting their being older when entering care. One study found that:  

Children manifest complex psychopathology, characterised by attachment difficulties, relationship insecurity, sexual behaviour, trauma-related anxiety, conduct problems and defiance, and inattention/hyperactivity, as well as uncommon problems such as self-injury and food maintenance behaviours. 

Schofield and Beek cite Stovall and Dozier in relation to the difficulties posed by infants who need permanent foster care: “Some infants’ histories placed them at risk for failing to develop secure relationships with even the most available and responsive caregiver.” This is specifically seen as ‘significant’ since the expectation is that those caregivers will be able to offer secure relationships in spite of previous adverse care. The problems are magnified with older children, given their increased risk from the nature and extent of previous abusive environments, the likelihood of multiple moves, unsatisfactory previous placements and, very often, a strong emotional attachment still to the birth family. Their

1241 It is necessary of course to acknowledge the pragmatic reality of the difficulty in finding appropriate placements easily.  
1242 Canadian Paediatric Society, Community Paediatrics Committee, Position Statement, above n 1214.  
1243A Sarah McLean and others, Challenging behaviour in out-of-home care: use of attachment ideas in practice, Child and Family Social Work 2013, 18. This article refers to a South Australian study which considered challenging behaviour amongst school-age children in put-of-home care. Interviews were conducted with those working with those children. The behavioural challenges presented by the children were consistently ascribed to attachment problems. However, there was a misuse of “attachment constructs” (at p. 250) as the concept was being used to describe four ways that the relationship between presentation of concerning behaviour and ‘attachment’: “(i) attachment as not desired by some children; (ii) attachment as a close dependant relationship; (iii) attachment as a capacity that is limited; and (iv) attachment as a relationship skill that is transferable” (at p. 245). The possibility of a ‘mis-diagnosis’ of what is ‘causing’ behavioural problems for the permanently placed child has significant implications for the provision of therapeutic support.  
1243 Tarren-Sweeney and Hazell above, n 515, at 96.  
1245 Schofield and Beek, above n 515.  
1246A Biehal and others, above, n. 837. See also chapter 9.9.
likely later entry into care as noted above is also a highly relevant factor. A recent and powerful articulation of the reason for why supports are required for children who have been permanently placed was set out in the *Menzies judgment.*

[11] Nor is it necessary, in determining the parameters of the Services Order for the Court to be satisfied that there is some causal link between the assistance sought and the deficit for the child which precipitated state intervention. Rather, the entitlement enshrined in the UN Convention is for special assistance. In my view, reading that provision with the Children, Young Persons and Their Families Act the New Zealand state has accepted that children who are requiring on-going state intervention to improve their care are entitled to the benefit of the various orders of assistance which are found in the CYPF Act. The deficits which have caused the intervention will predictably impose deficiencies upon children which may last longer than it takes to settle them into desirable permanent care, and may be different in type or severity from the presenting deficiencies at time of intervention. Because of the existence of the need for intervention it appears clear that the general drafting of the entitlement to Support and Services Orders, particularly, contains a recognition by the State that children who have suffered detriments of that nature, sufficient to justify state intervention are then entitled to special assistance, over and above that to which otherwise privileged citizens are entitled. Thus, the provision of educational assistance falls squarely within the assistance which could be provided under a Services Order.

An added dynamic here is the need to ensure that the new family is not placed under unnecessary additional stress: this is irrespective of whether that be through having taken on board the responsibility for the care of a child with a particular history, and dealing with birth parents who may be unhappy with the placement, with their contact or guardianship issues and who may be prepared to litigate over these matters.

In November 2006, the EXG Review acknowledged that children coming into care have poorer health than the generic child in the population and may have a “range of temporary or permanent disabilities, mental health needs and/or disruptive behaviour disorders” and

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1246 *Menzies v Ministry of Social Development,* above n 581.
1247 Given that there is almost always a history which will manifest itself in one way or another – physical, psychological, behavioural or developmental.
1248 See Coyle, above n 656.
1249 The previous discussion concerning the EXG report occurred in the context of issues concerning the ability of CYFS to deal effectively with the tasks required of it. The report in identifying those matters did so in
could be put into three groups: firstly, a small and highly varied group with very high and complex needs, secondly, a large group with behaviour and/or disabilities who require long-term extensive effort to parent and to manage, having consequences for security and stability of placement and school engagement. Lastly, were the majority of cases, represented by children with temporary health and/or developmental needs deriving from neglect, developmental delay or failure to thrive. Any of the children from these groups could be permanently placed. There will also be differences arising from whether the child who is permanently placed is an infant or an older child or adolescent. For older children there is a constant tension between responding appropriately to their “specific emotional needs generated by gaps and distortions in their earlier development, while promoting their age appropriate academic and social competence in the current world of school, the peer group, and the community.”

Children who are removed from families at birth or soon thereafter and are placed as soon as possible with a permanent new family are far less likely to present with behavioural or other issues in later childhood and into adolescence. The 2008 Briefing to the Incoming Minister identified that conduct problems affect 5 - 10 per cent of New Zealand children and “are the single most important predictor of poor mental and physical health, academic underachievement, early school leaving, teenage parenthood, delinquency, unemployment and substance abuse.” A 2010 estimate was that “as many as 65 per cent of children who come into …care have mental health or behavioural problems. Some 40 per cent have a mental health disorder that warrants referral to a specialist mental health service.”

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The reality for most caregivers of permanently placed children, therefore, is the need to confront the dual legacies of the care and protection concerns that led the child being taken


Ministry of Social Development and Employment, above n 725, and appendices - Permanency, Whole of Government Responses to Demand, Risk of Suicide, Serious Mental Health Issues, Serious Behavioural Issues, High Risk Infants (addicted babies) and Absconders and Offenders.

See for example Rushton and Dance, above n 910; Schofield and Beek, above n 515; Triseliotis, above n 515.

Schofield and Beek, above n 515, at 4.

See the discussion in Chapter Nine above where this the relevant literature is discussed. See Bennett, above n 43, at 21, where this acknowledged and further, where it was accepted that the experience of growing up in care “quite simply” increases the chance that “children will develop mental health or behavioural problems. Hughes, above n 921, at 2.

Bennett, above n 43, at 21.
into care in the first place and their subsequent care history. A further factor is the biological legacy that such children bring with them to their new families. This is separate from those parental acts or omissions that may have resulted in intervention taking place and might include autism or developmental delay from a clearly genetic origin. These are added challenges that the new family must take into account. The behaviour/issues may be manifested in a variety of ways that will either be readily apparent or simmering below the surface to present at some later time. This latter dynamic also reflects the different way in which children learn from infancy how to organise their behaviour around the parenting they receive and adapt to the relationship environment in which they find themselves. The maltreatment of a child forces them to adapt in order to survive. The successful caregiver must be able to address the inner and outer worlds of the child irrespective of their age and needs. Different issues will be present in any particular case. In this respect an ‘evidence-based approach is essential. The specific issues relating to the specific child and his or family must be addressed, but also invokes the need to scrutinise existing shibboleths about that that behaviour and how to address it for the wellbeing of the child. This will reflect not only the ‘legacy’ but other factors as well in determining the nature and extent of the supports required. These will also be affected by the age of the child and the socio-economic world of the new caregivers.

12.5 Policies relating to post-permanency support

Some families who take on the responsibility of permanent care may have the resources to meet the legacy needs of the child without assistance being provided by the State through its social agencies. This raises for debate the philosophical question of whether it is reasonable

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1256 And which could involve the consequences of neglect, physical, sexual, and emotional/psychological abuse, exposure to drugs or alcohol in utero, amongst a myriad of possible causative factors.
1257 In respect of the care legacy, this may embrace the consequences of care drift (including multiple placements) and being further abused or neglected when in care. The Department of Child, Youth and Family Children and Young People in Care. A User’s Guide to the Permanency Policy, above n 63, accepted this as being the case. Consequences were identified as impairing brain growth, mental development and psychological adjustment.
1258 Department of Child, Youth and Family Children and Young People in Care. A User’s Guide to the Permanency Policy, above n 63, at the chapter “Permanency and Meeting the On-going Needs of Children and Young People – A Guide to Support” at 1-2 refers to the sexually abused child who may be “stabilised through initial interventions and therefore have no requirement for ongoing counselling when they move to permanency, but they may require this at subsequent points in the future such as at the beginning of adolescence or their first serious relationship.”
1260A Sarah McLean and others, above n 1243A.
for a family who takes on responsibility for a permanently placed child to have an expectation that the costs of raising the child should, to some extent, continue to be met by the State? Is there an expectation once legal ‘permanency’ occurs that the new family must take that responsibility on board? This appears to be the case.\textsuperscript{1260} The March 2006 permanency policy was a somewhat radical departure in owning the need to provide substantive support to permanently placed children by accepting that they had needs going beyond the norm,\textsuperscript{1261} and implementing that philosophy. It did not last, having a relatively short life and, in retrospect, was never at all wholeheartedly endorsed by the Chief Executive.\textsuperscript{1262} It was observed that the Chief Executive “seems reluctant to make adequate provision for addressing the on-going care and protection needs of the permanently placed child”\textsuperscript{1263} and that much was “anecdotal”, remains prescient.\textsuperscript{1264}

In April 2008 the Chief Executive argued (in submissions before the Family Court) that a services order\textsuperscript{1265} is intended to be made available only to address discrete and identifiable care and protection needs of children and that an order made going beyond this, creates:\textsuperscript{1266}

\[\text{... a further level of benefit entitlement accruing simply through the fact of [the children] having been in the custody of the Chief Executive.}\]

\textsuperscript{1260} See the discussion of \textit{MI v Ministry of Social Development}, above n 581, where the Court accepted that there was a duty on the caregivers to contribute having accepting the task of caring for children.

\textsuperscript{1261} Department of Child, Youth and Family \textit{Children and Young People in Care. A User’s Guide to the Permanency Policy}, above at 17 of the User’s Guide above it was recognised that caregivers in any given instance “may need” practical and emotional support for managing difficult situations or behaviour, financial support over and above the unsupported child allowance and the [then accompanying] care supplement, and professional support to meet any other needs of the child. The draft orders specifying the kind of supports contemplated, together with the “support framework which detailed the kinds of supports that had to be considered in every case are set out in Appendix 3.

\textsuperscript{1262} In practice, in the experience of this writer, social workers, presumably on the basis of instructions from above, began to argue about the need for specific aspects of post permanency supports around 2007 – 2008. Negotiation of appropriate supports proved to be a difficult task. There was also inconsistent practice between individual CYPF sites. It was and remains difficult to quantify this with any precision. Much is anecdotal, being based on personal experience or gathered informally from colleagues working in the area across New Zealand.

\textsuperscript{1263} Cooke, above n 34, at 41.

\textsuperscript{1264} The Brookers commentary at NT3.04 reflects this [still] (Brookers Family Law — Child Law, above n 511). It appears that there may have been some attempt to resile from this policy. In a number of cases (\textit{Re H [access] FC Christchurch}, CYPF009/025/92, 4 March 1998; \textit{F v DGSW} [1999] NZFLR 351; \textit{ACP v Chief Executive of CYFS FC Rotorua FAM-2001-063-970, 4 July 2005}) CYFS has attempted to avoid responsibility for securing and maintaining the care and protection of a child whose placement had been secured under the Guardianship Act 1968 or Care of Children Act 2004, by refusing to provide or fund legal representation for the child's caregivers when a natural parent sought to destabilise the placement by litigation.

\textsuperscript{1265} The usual order for delivering post-permanency supports.

\textsuperscript{1266} And overlooking that the policy saw the services order as one of the vehicles for delivery of support. In \textit{Re BT FC Manukau FAM 2002-092-0344}, April 2008, submissions filed by counsel for Chief Executive. The case was resolved in favour of the caregiver. The argument ran counter to the stated policy of the Chief Executive but provided an indication that the policy was in its death throes. (The writer was lawyer for the child.)
This was notwithstanding that the 2006 policy provided an extensive panoply of possible supports for the permanently placed child and contained a specific discretion for the Chief Executive to "provide for other needs that are unrelated to the ... care and protection concerns, but is not required to do so." The policy went on to accept that in some cases of “extraordinary circumstances” a child (or a family group of children) may have a need for support that lay outside of the general scope of the policy. Where this was perceived as being a barrier to achieving permanency, managers “can exercise discretion positively … in order that the best outcome is achieved for the child.” The nature and extent of the supports required will reflect the history of the child: the major challenge of parenting maltreated children is “their profound lack of trust and the need to control others.” Foster children are often unable to process their new realities and ‘paradoxically’ the more the new parents try to offer good care the more devious they may appear to the child and the more likely they are to be treated with contempt and as sources of anxiety and deception as opposed to sources of security.

The March 2006 policy provided a sophisticated raft of supports which could be cherry-picked having regard to the individual circumstances of the case. There were financial implications for the State but the policy was implemented on the premise that the investment that occurred in addressing the issues posed by permanently placed children would result in savings in the long-term. In the 2005 Briefing to the Incoming Minister, the then Chief Executive advised that CYPF received $437.331 million (GST exclusive) for Vote Child Youth and Family Services. As at 30 June 2005 there were 4,835 “distinct clients” in care and protection placements and 14,335 distinct clients receiving post-care and

1267 Department of Child, Youth and Family Children and Young People in Care. A User’s Guide to the Permanency Policy, above n 63, at 18 of the User’s Guide. It is not entirely clear what this embraced. It may have been no more than the discretion which permitted additional support to be provided in extraordinary circumstances. The 2006 policy, like the current home for Life Policy contemplated other responsible State agencies (health and education in the main) meeting the cost in the first instance where that was appropriate. This writer would draft services orders requiring the Chief Executive to fund the cost of, for example health or education intervention where that intervention could not be provided within an appropriate child-focussed timeframe. Of course it was always a matter of debate as to what that was.

1268 Department of Child, Youth and Family Children and Young People in Care. A User’s Guide to the Permanency Policy, above n 63, at 3, chapter headed “Permanency and Meeting the ongoing Needs of Children and Young People – A guide to support.” Where this discretion was exercised the manager was required to “bear in mind the normal expectations and rules of public expenditure.”

1269 Schofield and Beek, above n 515.

1270 These were covered with sign-off from both MSD and Treasury. Cooke, above n 34, at 40.

1271 Cooke at 40. It also recognised that care had to be taken to ensure that caregivers, if they received supports contemplated by the policy would not become ineligible for the unsupported child benefit.
protection social work intervention. The Briefing Paper noted that demand was increasing and the numbers of children in care was growing. The March 2006 permanency policy reflected the perceived need to ensure that children in care were placed in new and stable permanent homes, with their caregivers being supported in their parenting role.

It would appear, but cannot be established, that the policy was unsustainable given the cost of running the child protection system. This is at least implicit from the 2008 Briefing Paper to the Incoming Minister; the snapshot given was of a department facing continuing challenges in terms of increasing notifications and high numbers of children in care, and with a growing number of children in care with high needs. The primary role of CYFS was to provide care. The Chief Executive referred to having to increase the number of permanent homes for children in care and of the need to be more strategic about using foster caregivers, to focus on children with high needs and to “better identify the interventions needed, to upskill our carers, and to ensure they have access to the right support.” He noted that the first years of a child’s life are critical as this is when intervention is “cheapest and most successful” and it is more difficult and more expensive to address later on. The need to provide better support for young people leaving care was also identified. The Minister was advised that there would be an emphasis on early intervention - through access to universal services and, in that way, removal of the need for later and more expensive intervention. Remedial and statutory services would focus on the 6,000 children aged

1272 Paula Tyler, above n 1000, at 2.
1273 Paula Tyler, above at 5-6. There had been a 90% increase in notifications between August 2001 and August 2004 and a 23% increase between 2003/04 and 2004/05. Care costs were increasing as was the length of time a child was spending in care.
1274 Paula Tyler, above at 7. The permanency work was done in conjunction with MSD which was reviewing the various payments paid to caregivers.
1275 At 8. In the year ending June 2008 there were 98,890 notifications, an increase of 31% from the previous year. The increase was mainly as a result of family violence notifications from the Police. Spending was now $407.028 million. There has been a marked increase in referrals. See above n 515 referring to the 2011 Briefing to the Minister where advice was given that in the year ending June 2011, there were 150,747 notifications, including family violence referrals and of the observation in March 2013 from the Children’s Commissioner “the bulk of the 150,000 referrals made last year from health and police were for children who were witness to domestic violence.”
1276 The most recent figures available are that the numbers of children in care has reduced. See Table One above at 35. (This presumably has resulted in some reduction in cost, when appropriately adjusted)
1277 Hughes, above n 921, at 8 and 12.
1278 Hughes, at iii.
1279 Hughes at 2.
1280 Hughes at 3, where reference is made to the following: antenatal maternity services which had 91% of women enrolled with a primary health carer; the Wellchild programme which had 90% participation; primary
between zero and 17 years in the custody of the Chief Executive. Care was the most significant cost – non-discretionary costs such as board, clothing, health and education embraced just under $10,000 for each 0-4 year old and almost $13,000 for those aged 14 – 16 years. Children with severe conduct disorders and behaviour problems were costing two to three times as much as children without those presentations; high needs children were accounting for 20 per cent of the cost of children in care with some individual plans costing up to $300,000 per annum and involving multiple agencies.\textsuperscript{1281} There was also to be an emphasis on working with other agencies and the provision of “timely co-ordinated services.”\textsuperscript{1282} In respect of permanency, the Minister was advised that this was “core to our work as a care organisation”\textsuperscript{1283} and that the earlier permanency occurred, the less need there would be for foster care, resulting in better outcomes for children and allowing “scarce resources to be directed to more children in need of care and protection.”\textsuperscript{1284}

\textbf{12.6 Home for Life policy}

The Minister of Social Development announced the Home for Life policy on 12 August 2010, and it took effect from 1 October 2010. The New Zealand Herald reported that the “new welfare initiative will provide personal and professional support to parents taking on foster children permanently in a manner of care which stops short of full adoption.”\textsuperscript{1285} The policy provides for caregivers to receive an assistance package which, the Minister was reported as saying, would make it easier to offer a child a permanent home. The Ministerial statement went on to observe that the policy was expected to reduce the amount of time that children were in state care and to reduce the number of children in that care by 1200 over four to five years. This was from a total of around 5500 children who were in the custody of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1281} At 9.
\item \textsuperscript{1282} Hughes, above, n 911, at 11.
\item \textsuperscript{1283} Hughes, at 24.
\item \textsuperscript{1284} Hughes, at 25.
\item \textsuperscript{1285} “Help to make foster care permanent” New Zealand Herald, above n 862. The report went on: “Social Development Minister Paula Bennett said the package made it easier to offer a child a permanent home. ‘There are just over 2000 foster parents currently, many of whom want to take on a child permanently, but are concerned about losing state support and being left to cope alone,’ she said.”
\end{itemize}
\end{footnotesize}
CYFS at any one time. This provides a significant context to the policy as the number of children in care had then been steadily rising.\textsuperscript{1286}

The CYFS website identifies a Home for Life as having been achieved when all of the following has occurred: the child or young person is in an approved home for life placement; the caregivers have obtained legal orders to secure the home for life placement and custody orders in favour of the Chief Executive have been discharged.\textsuperscript{1287} The website goes on to prescribe that the package consists of three years support after the transfer of orders to the home for life parents, with the supports being offered including:\textsuperscript{1288}

\begin{itemize}
  \item reasonable legal costs for the proposed home for life parents;\textsuperscript{1289}
  \item a $2,500 upfront payment paid after the home for life orders are granted;
  \item follow up telephone contact with the home for life parents every three months and a support visit every six months;
  \item access to the national foster care training programme;
  \item a baby starter package for children under two years at the time of placement to cover the cost of items such as high chairs, cots, clothing or other things needed to get started with caring for the baby. These items can be provided as soon as the placement is made if required;
\end{itemize}

\textsuperscript{1286} In the mid-1990s there were around 2500; by June 2002 there were 4,517 and by June 2006, 5,095. Ministry of Social Development and Employment, \textit{(CYF) Care and Protection EXG Reviews: Whole of Government Responses To Demand and Permanency}, above n 725, and appendices \textit{Permanency} and \textit{Whole of Government Responses to Demand}. See also Table One above, p 38.

\textsuperscript{1287} CYFS Practice Centre, above n 1039. The policy requires the orders in favour of the Chief Executive to be discharged but contemplates the caregivers obtaining either orders under the Act or under COCA. It is the experience of this writer that it is very rare for custody orders to be made under the Act in favour of the caregivers. Rather, there is an almost exclusive emphasis on COCA orders. The policy also provides that in certain limited circumstances where a child is the subject of an extended care agreement under s140 of the Act the caregivers may be eligible for the policy.

\textsuperscript{1288} CYFS Practice Centre, above n 1039.

\textsuperscript{1289} The assistance with legal costs is an agreement to mount to a $1500 to cover the caregiver’s legal costs. This appears to have been lifted to around $1750 having regard to the need to pay a filing fee when the COCA application is filed. Issues arise when the birth parents defend the applications filed. Caregivers may find the Chief Executive then balk at paying the legal fees or suggesting that applications are made for legal aid. (This is within my experience.) The policy suggests this can be the subject of negotiation. The policy also provides for financial support being provided in the event of their being subsequent litigation in respect of the child. Home for life parents defending any subsequent proceedings bought by birth parents or seeking additional orders, in order to secure the child’s home for life placement. This excludes proceedings which may have to be instituted by the caregivers. (A dispute between guaridnas or over contact.)
- linking the home for life parents with the right financial assistance through Work and Income;
- identifying needs that could be met by other agencies, and advocating and liaising with the agencies for services, as required;
- working with the child or young person's birth family to support on-going contact so that it is safe and works well for the child or young person;
- five days of respite care/holiday programme per year for three years if required. This is available for the child … in the home for life placement and can include other children in the home. If the parents also want to go to the camp with the children this is an option;
- a review prior to the end of the three years to ensure any on-going support needs are identified and referrals to community agencies are made.

There a number of issues with this policy and its application. Firstly, there is the three year life span: is this adequate given the age of the child, their care and protection and/or care legacy, and the resources, (both economic and personal and including the age) of the caregivers? At the conclusion of that period what will happen? The obligation is to go back to the Chief Executive and negotiate continuing support, or to the designated NGO which has responsibility for providing the support package. This is indicative of the State removing itself from direct involvement and responsibility and requiring caregivers to assume responsibility for the child. The approach taken to financial supports illustrates this: when the Chief Executive has custody, the caregiver receives board payments, a quarterly clothing allowance and the Chief Executive will pay for the child’s medical and education costs. Under the Home for Life policy the expectation is quite different: the Chief Executive will not continue the clothing allowances or other regular payments and does not expect caregivers to seek those payments by way of services orders. The sum formally received in board payments is substituted by the unsupported child benefit paid through WINZ and is intended to cover the general needs of caring for a child. That equates to the board payments previously received; however, the caregivers are financially worse off through the loss of the

1290 The package for the three years social work support has been contracted out to various NGOs. These include Barnardos and the Open Home Foundation.
1291 CYF Practice Centre, above n 1040. Compare this with the supports set out in the 2006 policy, reproduced at Appendix Five.
clothing allowance\textsuperscript{1292} and the obligation to now pay for educational and medical costs where these are not otherwise covered by responsible agencies. If additional financial support or specific services are required to meet the specific on-going needs of a child, these have to be discussed and agreed prior to the caregiver seeking orders.\textsuperscript{1293} Further, the policy contains no procedure for the resolution of disputes between caregivers and the Chief Executive and the fact that a greater or lesser sum than the $2500 (or support over a greater or lesser period of time) may be required in any given instance.\textsuperscript{1294}

Secondly, the package is probably more acceptable if the caregiver has taken home a baby or infant.\textsuperscript{1295} Thus the payment of $2500 and the provision of a baby starter package will be helpful. The contrast can immediately be seen with an older child and/or the child with a significant care and protection and/or care legacy. Lawyers acting for caregivers should give careful consideration to the adequacy of the payments having regard to the age of the child. Good practice requires this. Table Three sets out the figures provided by Atwool and Gunn

\begin{table}[h]
\centering
\begin{tabular}{|c|c|}
\hline
Age group & Clothing allowance amount \textsuperscript{1296} \\
\hline
Child under 5: & $143.32 \\
5 – 9 years & $166.32 \\
10 – 13 years & $183.53 \\
14 and over & $200.65 \\
\hline
\end{tabular}
\caption{Quarterly clothing allowance amounts to $50.73 for a child under 5 years of age and rises to $421.19 for those aged 14 years and over. Once a child is permanently placed and COCA orders made the entitlement to board payments and the clothing allowance stops. The caregiver is required to make an application to WINZ for the “unsupported child benefit” (“UCB”). This is not means tested and is payable to those who look after children that are not their own. The unsupported child benefit – post COCA orders – (non-taxable) as at 1 April 2012 provides support at the same rate as board payments. (Work and Income New Zealand “Orphans Benefit and Unsupported Childs Benefit (current)” (1 April 2013) <http://www.workandincome.govt.nz/manuals-and-procedures/deskfile/main_benefits_rates/orphans_benefit_and_unsupported_childrens_benefit_tables.htm>).}
\end{table}

\textsuperscript{1292} This payment varies depending on the age of the child. These are entitlements the child has by virtue of being in care. The nature and extent of these supports are there because of the care and protection issues present for that child which have to be addressed and which are specific to the child. They ensure that the caregiver of the child is in a position to provide adequately for the child and his care and protection and care issues are being addressed. Whatever the board payments embraced it did not include clothing. The provision of the separate clothing allowance from the board payments goes to show that conceptually the two are distinct — the board payment is not intended to be used for the provision of clothing — why therefore is the situation changed once COCA orders are obtained? These payments are made because it is seen as being in the public interest that those who take on the responsibility of caring for abused children are able to clothe and feed them. The following figures are as at 1 April 2013. (“Foster care allowance rate” Child Youth and Family (1 April 2014) <http://www.cyf.govt.nz/documents/info-for-caregivers/microsoft-word-final-fact-sheet-caregivers-fact-sheet-2012.pdf>.)

\textsuperscript{1293} CYF Practice Centre, above n 1039. The policy notes that “[D]espite people’s best efforts, not every future contingency can be planned for. Therefore, ad hoc financial support can be provided to home for life parents through s 389 of the… Act.” Use of s 369 is problematic given its inherent discretionary nature.


\textsuperscript{1295} As previously noted, children who are removed at a young age and permanently placed are likely to have better outcomes than older children who will probably be more damaged.
showing the worth of the Home for Life payment of $2,500 over the life of the permanently placed child. It makes sobering reading.\footnote{Atwool and Gunn, above n 506, at Appendix 1. (There is no adjustment made for inflation.) This writer recently (July 2013) settled a case for clients who were under some pressure to agree to discharge a services order. A proposal was made that consent would be given if the Chief executive made a lump sum payment of $25,000 plus legal fees. This has been agreed to.}

### Table Three

The Home for Life Payment Over the Life of the Child

<table>
<thead>
<tr>
<th>Child’s current Age</th>
<th>Years with Home for Life</th>
<th>Annual $ based on $2,500 lump sum</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-1</td>
<td>17</td>
<td>147.05</td>
</tr>
<tr>
<td>1</td>
<td>16</td>
<td>156.25</td>
</tr>
<tr>
<td>2</td>
<td>15</td>
<td>166.66</td>
</tr>
<tr>
<td>3</td>
<td>14</td>
<td>178.57</td>
</tr>
<tr>
<td>4</td>
<td>13</td>
<td>192.30</td>
</tr>
<tr>
<td>5</td>
<td>12</td>
<td>208.33</td>
</tr>
<tr>
<td>6</td>
<td>11</td>
<td>227.27</td>
</tr>
<tr>
<td>7</td>
<td>10</td>
<td>250.00</td>
</tr>
<tr>
<td>8</td>
<td>9</td>
<td>277.77</td>
</tr>
<tr>
<td>9</td>
<td>8</td>
<td>312.50</td>
</tr>
<tr>
<td>10</td>
<td>7</td>
<td>357.14</td>
</tr>
<tr>
<td>11</td>
<td>6</td>
<td>416.66</td>
</tr>
<tr>
<td>12</td>
<td>5</td>
<td>500.00</td>
</tr>
<tr>
<td>14</td>
<td>4</td>
<td>625.00</td>
</tr>
<tr>
<td>15</td>
<td>3</td>
<td>833.33</td>
</tr>
<tr>
<td>16</td>
<td>2</td>
<td>1,250.00</td>
</tr>
<tr>
<td>17</td>
<td>1</td>
<td>2,500.00</td>
</tr>
</tbody>
</table>

Thirdly, an issue with any permanency case in New Zealand is that where the caregivers have COCA orders the notion that a permanent placement is created that is lasting for the child until he or she reaches independence can be illusory. ‘Permanent’ cannot have an objective meaning given to it because parental responsibility is often held by others as well as (or opposed to) the permanent caregiver, including birth parents and/or state or local authorities.\footnote{Triseliotis, above n 515.} This is a factor accepted in both the UK and the US (and canvassed in New South Wales) as contributing to the advocating of adoption as the appropriate permanency route.
once a return home cannot occur. As noted, COCA orders may be the subject of challenge as to ongoing day-to-day care or contact and over matters of guardianship. Caregivers must therefore be protected against possible legal challenge and, given their duties and obligations as guardians, must be protected as well should they be required to institute proceedings themselves.

It is the premise of this thesis that, conceptually, it is wrong for the State to assert that when COCA orders are made and a child is ‘permanently placed’, and the caregivers are appointed as the child’s additional guardians, they should be required to take on in every respect, and throughout the child’s childhood and adolescence, total responsibility (including financial) for that child. That may be possible in certain (rare) situations where the new family has the resources to cope without specific additional support from the State through the Chief Executive and philosophically may accept that situation. Each case must be addressed on its merits. Schofield and Beek correctly draw a connection between choosing the best possible caregivers and at the same time ensuring that those caregivers are appropriately supported:

What is clear is that caring for troubled and challenging children on a long-term basis is complex, demanding and often expensive and carers need to feel adequately supported.

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1298 See for example, Department of Health Adoption: A new approach A White Paper, above n 829, and the Adoption and Children Act 2002 (UK); the Adoption and Safe Families Act of 1997 Pub L No 105-89, 111 Stat 2115; Kate Murphy, Marian Quarty and Denise Cuthbert “In the best interests of the child: Mapping the (Re) emergence of Pro-Adoption Politics in Contemporary Australia” (2009) 55(2) Australian Journal of Politics and History 201-218; P Parkinson, above n 829; Rath, above n 1016.
1299 As discussed in Chapter Nine.
1300 This may reflect the selection policy of the Chief Executive. For example, the Permanent Placement Unit in Auckland appeared to have a practice of selecting caregivers who are financially secure. (Informal advice to this writer from a former supervisor of that unit)
1301 One case I have is indicative of the issues here. There are siblings who are permanently placed but separated. The caregivers each have a services order in their favour with these administered through different CYPF offices. One office simply continues the order without issue. Another is seeking to have the order discharged. The rationale for this is philosophical: the most recent plan filed by the case social worker contains the following paragraph: “The permanency plan for children who come into care has changed since the Home for life model was engaged at the end of 2010. This model has the community agencies becoming the lead agencies in assisting families where there are no care and protection needs and links to community resources are required. Given this new mode of practice and the focus on greater community supports available, I believe that the Ministry has no need to remain further involved in J’s life”. This is in respect of a child whose birth mother has a history of alcohol and drug abuse, and a mental health history, including ingestion of drugs/alcohol during her pregnancies. The child is aged (at the time of writing) 7 years of age. The caregivers are concerned to ensure that there is clarity, as far as possible, around the implications of that maternal history. They consider a neuropsychological assessment is required. There is no agreement by the Chief Executive to fund this – as there are no care and protection issues for the child in the placement and the Chief Executive under the home for life Policy has no role to play. (Discussions are continuing and resolution, as at December 2013, may be in sight.)
1302 Schofield and Beek, above n 515.
remunerated. Additionally, adequate financial support can enhance sensitive caregiving. … But an important proviso, here, is that appropriate financial support is necessary but it does not, in itself, create the sensitivity or commitment that is essential to parent children … on a permanent basis.

12.7 Case law

There has been a steady development in jurisprudence in relation to post-permanency supports. The Family Court has now, on a number of occasions, made orders and, more importantly, issued judgments that remind the Chief Executive of his duties and obligations to the permanently placed child and its family. A problem for many caregivers, however, is that their lawyers are often unaware of the distinction between policy and the law and that there are times when the law will provide for circumstances where policy does not.1303 The statutory scheme explicitly gives the Court more than just a supervisory jurisdiction; it empowers the Court to have the final say on the nature and extent of the services and assistance to be provided to a child and the family. The application of ‘policy’ takes second place to the law and to whether the law requires the assistance to be provided. However, a conundrum arises should litigation be contemplated against the Chief Executive on a dispute over services to be provided to the child and family: the caregivers’ legal fees are generally met by the Chief Executive. This is part of the strategy of the Chief Executive in encouraging caregivers to take COCA orders. Why should the Chief Executive fund litigation against himself? In the event of refusal, as occurs, the caregivers must fund the litigation themselves1304 or apply to the Court to make their legal costs part of the services order applied for.1305

1303 Personal experience and observation.
1304 Whether from their own resources or by way of legal aid.
1306 The latter often successfully occurs, at least in my experience. However, see Re N FC Manukau, FAM 2005-092–1270, 26 April 2007. Counsel for the applicant caregivers who were seeking COCA orders sought leave to withdraw from the proceedings as MSD would not agree to cover the cost of litigation over a services order. The Court refused that application, finding it “difficult to accept that Mr and Mrs T should be deprived of representation at that hearing because the Ministry will not fund the same.” The Chief Executive was funding the substantive proceedings; “while strictly speaking the s 86 hearing is not a [COCA] proceeding, resolution of the dispute about the s 86 order is integral to the progression and resolution of the [COCA] proceedings. The Ministry’s stance therefore appears contrary at least to the spirit of their stated plan.” The Court then observed that the User’s guide, above n 63, made provision for support which lies outside of the range canvassed in the document in the usual cases. It was an invitation to reconsider. Atwool, above n 725; Atwool and Gunn, above n 506, at 42. It is this writer’s practice to expect the Chief Executive to pay. This has generally occurred. See for example, the discussion below re the MI case at 333, this being such an instance.
There are relatively few defended cases on whether the Chief Executive should be required to assist children and the new family. In such a case the applicant must establish a factual basis for the order sought. The onus is then transferred to the Chief Executive to show why the orders should not be made - the criteria being that the order would be clearly impracticable for the service provider. The order needs to promote the children’s best interests. There is also no duty at law to show ‘necessity’ as an element of the statutory test and the Court can order support that goes beyond the discrete care and protection/care legacy and can extend to other matters such as the child’s biological history.

As previously set out, the conceptual basis for requiring the Chief Executive to fund/support caregivers comes from the premise that the child’s care and protection issues simply do not disappear once a permanent placement is found. The Family Court was at the forefront of setting out this reality for the Chief Executive. The case of F v D-GSW was critical in this respect. It embodied the perspective held by social workers that the child, once permanently placed (and COCA orders made), was no longer in need of care and protection. The fact of placement having occurred was sufficient in itself and, without more, enough to

1308 Re an Application by CK [2006] NZFLR 350. The child was in the care of grandparents. Access to her mother was in her best interests. However, access was limited because of the financial resources of the parties. The Chief Executive opposed an application for a services order to assist with access as access was already taking place. An order was not seen “necessary.” The Court held otherwise. Necessity was not required; to hold so would be to insert an element into s 86 that is not present. The focus of the services order was on the practicability of making the order and the child being in the care of a person consistent with the principles and objects of the Act.
1309 See J v Ministry of Social Development FC Wellington, FAM 2001-085-1727, 23 September 2008. The Court held had the Chief Executive’s responsibility been intended by Parliament to be so limited the Act would have said so, it would have been limited to the prescribed matters, “and not more generally, as if in loco parentis.” At [24]. The child was morbidly obese and family members having care arranged for the necessary surgery without getting the agreement of the Chief Executive. The discrete issue was whether the court could order reimbursement for a service already provided. It held that it could. See also Menzies v Minister of Social Development, above n 581.
1310 F v D-GSW [1999] NZFLR 351. A decision of Judge BD Inglis QC. The issue was the provision of funding for the caregiver’s lawyer following discharge of the orders in favour of the Chief Executive and the making of orders in favour of the caregivers. The Chief Executive did not want to fund that cost. See also Re the five M Children [2004] NZFLR 337 at paragraphs [58] and 69] where Judge Inglis QC made similar orders as in F v D-GSW and cited that case as authority.
have cured or repaired the ills that led to intervention. This is simply misconceived and is unsupported by the research evidence.

There are a small number of important cases that are illustrative of the approach taken by the Court in instances where there are differences between the Chief Executive and caregivers as to the nature and extent of the support to be provided. The first is *RE ACP* where the applicant sought a services order to cover anticipated expenses concerning the children’s physical, medical and psychological needs, in addition to litigation expenses. Not all of the assistance required could be accessed through the public health system or via community agencies. The Chief Executive took the position that other state agencies should fund the costs where appropriate (notwithstanding that some — e.g. Group Special Education (‘GSE’) would only become involved if specific criteria were met — which would result in an unmet need); that access should be had to community agencies; and that the treatment required (while not life threatening) would not be the subject of assistance from the Chief Executive. There was also a clear shortfall between what would be available in funding between the pre-permanency payments (board payments) and the post-permanency payment through the UCB and the care supplement. Orders were made against the Chief Executive. Once the evidential basis was established for the service orders, then it could not be contested that it was impracticable for the Chief Executive to fund the services.

Where there are still unresolved issues derived from the legacy it is important for the “children and the health of the wider community” that specialist assistance is given. The Court noted that external assistance such as that from GSE is provided only when behaviour becomes excessive: “One of the aims of care and protection processes is to ensure that counselling is provided to avoid

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1311 The *F v D-GSW* decision provides the conceptual springboard for the acceptance of other supports to be provided so as to preserve and not destabilise the placement. The Court noted that as well as funding future litigation costs:

> [C]onsiderations relating to the welfare of the child paramount issue (including protection of the integrity and stability of the child's home with the caregivers) will ordinarily be influential in determining what legal and other services, and their extent, are “reasonable” but an important further factor will be the Service's own responsibility to protect the caregivers, and thus the child, from any adverse consequences stemming from giving effect to the Service's own proposals. (The latter refers to the initiative by the Chief Executive to promote permanency.) At 361.

1312 See Atwool and Gunn, above n 506.

1313 *ACP v Chief Executive of Child, Youth and Family Services*, above n 581.

1314 Medical matters included surgical, hearing and orthodontic treatment.

1315 “Impractical” is accepted as having its standard dictionary meaning: — “incapable of being put into practice”: *ACP v Chief Executive of Child, Youth and Family Services*, above n 581, at [64], citing the Oxford Dictionary 1998, above n 25.

1316 *ACP v Chief Executive of Child, Youth and Family Services*, above n 581.
reaching such a high benchmark.” The issues regarding the children being in need of care and protection had not dissipated.

The second case is *Menzies v Ministry of Social Development*. This was an instance where the Court was asked to address an issue unrelated to the child’s care and protection or care histories, but rather emanated from his biological/genetic inheritance as developmental learning difficulties. Lawyer for child made an application for an order to require the Chief Executive to fund English language tuition to this 10-year-old Māori child who had been with his caregivers since the age of four months. The child had early developmental difficulties. A plan and a services order was implemented which saw the Chief Executive meet the cost of the child’s Māori education. The then current plan stipulated the services to be provided as “reasonable costs for specialist educational … treatment … which is thought to be necessary by the professionals involved and in prior consultation with the Ministry.” The parents of the child were concerned at his English language abilities and arranged for him to receive external English literacy tutoring which, initially, was funded (it seems) by the Chief Executive. The tutoring assisted the child’s Māori and English language acquisition. However, the Chief Executive refused to continue funding the English programme, on the advice of the principal of the child’s Māori school, with this being contrary to the policy of the school to provide English literacy education to 10-year-old pupils. Expert evidence was produced to the Family Court about when a child in a Māori school should be introduced to English literacy tuition if they were to be prepared to make the best possible transition to an English language high school. The Court made the order sought. Services and support orders were to be seen as being intended to give effect to the obligation of the State, under Article 20 of UNCROC, to provide special assistance to a child who is in need of care or protection because they cannot be cared for by their parents. This was notwithstanding that the child had been in permanent care essentially for most of his life. The Court expressed the essentially policy view that children who have suffered detriment sufficient to justify state intervention via a declaration are entitled to the special assistance guaranteed by the state’s ratification of the UNCROC. This was to occur without a need to establish a causal link between the assistance sought for the child and the initiating care and protection concerns which led to intervention by the State and the removal of the child from his birth family.

1317 *ACP v Chief Executive of Child, Youth and Family Services*, above n 581, at [75].
1318 *Menzies v Minister of Social Development*, above n 581.
Third, is the case of *MI v Ministry of Social Development*.\footnote{\textit{MI v Ministry of Social Development}, above n 581 As with the Menzies case the Court ordered that the support required to be provided could have regard to the child’s biological inheritance – issues pertaining to education. (This writer argued the case for the applicants.)} Here the Family Court accepted, in part at least, the reasoning in the Menzies case but placed limits on it. A balance had to be achieved between the responsibility of the Chief Executive and the child’s caregivers with regard to the financial needs of a child who has been permanently placed. The Court set out the situation at paragraphs [20] – [23]:

[20] In a legal sense these children are at a crossroads. For longstanding care and protection concerns the State, as prescribed by law has stepped in and endeavoured to afford these children protection.

[21] I suggest the central issue here is to consider the extent to which the State has an on-going obligation to recognise all that has flowed from the previous care and protection concerns against the benefits to the children as not being perceived as being under the State's care but having been handed to them the right as is enshrined under s 13(f)(iii) and (h).

[22] If that above proposition is correct, the consideration appears to be striking the right balance when considering the permanency proposal. On the one hand there must be I say a recognition of the environment from which the children have come from. There must also be a recognition that the Chief Executive in this case has provided significant support both financial and non-financial to assist the children to address and alleviate those care and protection concerns. The care and protection concerns in my view simply do not stop on the making of the permanency although things are much improved for the children as is clearly seen from the latest reporting.

[23] On the other side is the full notion as must be given to the children of the permanency proposal. They have a right enshrined at law to be out of the State's care in all facets of that. The evidence I have is that they are well bonded with the caregivers, see themselves as part of the caregivers' family and are an important and integral part of that nuclear and wider family structure. That is I suggest all that is countenanced as relevant to these circumstances in s 13 of the CYPF Act.

[24] Whilst it may be said that the present argument is really over finances, such would with respect in my view be too simplistic a proposition. Part of the assessment here is to
critically examine how this looks from the children's position. Their needs and the
requirements to properly support them and after considering the criteria as previously
set out which I adopt, assess whether the on-going support is required and if so what
level is appropriate, having regard to the children's welfare and best interests.

The analysis of the Court indicated that the responsibility of the Chief Executive was limited
to assisting in cementing in place the placement of the children with their caregivers and was
not as open ended as might be implied by Menzies. The permanency principles set out in s
13(f)(ii) and (h) of the CYPF Act required the Chief Executive to fund services to assist the
children to fully settle into their permanent placement, but this was to be time-limited.1320
Thus the Judge stated at paragraphs [29] – [30]:

[29] Having weighed the factors and the matters at issue, I am of the view that there is
some need and it is appropriate in the children's best interest for the Chief Executive to
respond further with further financial assistance for the children. It does not escape me
however (and it is not asked by the caregivers in this way) that that should not be
forever. That said it seems to me the change in location, the previous expectation and
the assistance required given their current financial means, all come to the position that
for a period of time I should put in place with the conditions of the additional
guardianship, financial assistance so far as after school care is concerned. I do not think
that that should be an extensive period. It was argued at hearing that there may in fact
be jurisdiction to seek a further variation of the additional guardianship (specific
purpose) order in time. That matter is not in focus before me but legislative provision
has been pointed to.

[30] I have a clear view that another reason why the provision should be for a finite
period is that the children's position currently will only improve.1321 They are cemented

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1320 In the particular case the need for support was especially acute as the carers and children had recently
relocated requiring the children to change schools. The Chief Executive, as an additional guardian (appointed
under s 110(2)(b) of the Act) was ordered to fund: the fees for the children to attend a holiday camp twice a year
for three years; the cost of after school care for the children for one year, with the latter six months not being
paid if both carers were not in full-time work; any future litigation arising in respect of the children between the
carers and the children’s parents; services required by the children to address issues arising from their history;
school fees; and a reasonable contribution to the costs of a venue/supervisor for the parents to have supervised
contact with the children twice per year.

1321 See the similar comment made in Chief Executive v TMH, above n 1309, at paragraphs [20] - [22] where in
an instance of a services order being sought to fund the cost of transport of children (who lived in Rotorua) and
their mother (who lived in Masterton) and where the cost of this was being met by the provision of petrol
vouchers, the Court expressed agreement with the argument of the Chief Executive that the mother should bear
into a firm, sound and appropriate nuclear family. I have some evidence of extended family support as well. It seems to me the decision of move to the Hawkes Bay is positive in all respects for not only the children but for the nuclear family.

Fourth is *AS v MSD*.¹³²² The child in question had health and disability needs and required special shoes. It was accepted that the costs of caring for the child could not otherwise be met, either by the caregivers or by other organisations. The Chief Executive was only prepared to support the caregiver grandparents by the Home for Life policy. The applicants calculated the cost of caring for the child until the child reached 17 years as $52,000. They would have accepted $20,000. The cost to the Chief Executive of sustaining the child under the CYPF regime would have totalled $130,000. The Court, in making the order as sought, was ensuring no more than that the existing services being provided to the child were continued. Without having that support, the caregivers could not continue to provide for the child. The following is recorded in the judgment:

[30] The MSD’s opposition is premised on the Chief Executive’s desire to implement the new policy and the desire to keep payments within reasonable limits.

[31] The site manager¹³²³ was quite willing to commit the Chief Executive to maintaining its s 101 custody order and paying approximately $130,000 (based upon the current level of financial commitment by the Chief Executive), until J reaches 17 years of age. However the MSD is not willing to make a lump sum payment of $20,000 to Ms S and have all other fiscal responsibilities cease, upon the making of permanency orders.

[32] This position was, with respect difficult to understand.

The Court commented on the Home for Life policy:

[35] Although the new policy which was produced at hearing provides that every child in a home for life placement must have a plan that addresses their needs now and into the future; it

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¹³²² *AS v MSD*, above n 1295.

¹³²³ It is sometimes necessary for lawyers involved in these cases to summons site or regional managers to give evidence about the position being taken by the Chief Executive. For example, in *Re M and M FC Papakura*, FAM 2001-031-000241, a case resolved by consent on the day of the defended hearing, the Chief Executive finally agreed to fund extensive services orders reflecting both the accepted legacy needs of the children and the intent of the policy. This writer as lawyer for the children had summonses issued to CYPF regional and site management so that the Court could hear why there was a refusal to support the children by way of the services sought.
also provides: “that the support package will be agreed before legal orders to support the home for life placement are sought and orders against the Chief Executive are discharged”.

[36] The new policy provides no process for resolving disputes between caregivers and the MSD, where there is no agreement to the support package. The new policy provides for a one off lump sum payment of $2,500 per child to provide for the individual needs of the child. There is no provision for payment of a lesser or greater sum within any defined criteria, consistent with the principles in the CYPF Act to address the individual needs of a particular child.

[37] The new policy recognises that there may be a combination of orders to meet the best interests of the child to ensure a stable permanent care arrangement.

[38] The new policy focuses on developing a case plan to address “permanent care needs “now and into the future” and refers to “necessary supports” and “on-going support and assistance to the caregiver to meet the child’s needs”.

[39] The new policy recognises that a services order may be appropriate and that services orders that are in place already, will continue and that some caregivers may wish to consider replacing the support order with the home for life support package.1324

At paragraphs 41(d) and (e), the Court explained why a lump sum payment in favour of the caregivers was made:

While as a matter of public interest, the MSD appropriately emphasised the fiscal responsibilities to the large numbers of children and young persons with varying needs who are in care, it is also important to recognise that the MSD needs to work with all its caregivers to ensure that caregivers of the calibre of Ms S are willing and available to care for children in need of care and protection. This is an important matter of public interest as well to ensure that safe homes can be provided by competent caregivers to all children in need of care and protection, to meet the needs of the children.

1324 In that case previous plans filed by the Chief Executive had specifically identified that a services order would in time be made. Thus the Chief Executive was in part hoist by his own [natural justice] petard. See also PFMB v JJB and Chief Executive [2012] NZFC 4689, where at paragraph [7] the Court stated that it “has previously expressed its concern at the practical implications of the Ministry’s current Homes for Life Package which seems to me to be a reformulation of its permanency policy. I again express my concern at the practical effects of that policy.” The judge went on to comment that the Ministry despite its assertion that each case is looked at individually, appeared nonetheless to be the application of a “blanket policy” with “scant attention” to the individual’s circumstances [8]; that negotiations to get consent involved meeting an implacable wall … This has been my experience as counsel in relation to the permanency policy and my experience as a Judge” [9].
(e) While there is a valid issue about consistency and uniformity in approach in view of the wide responsibilities of the Chief Executive of the MSD, the objects and principles of the CYPF Act need to be met now and into the future, in view of J’s special needs and his individual circumstances.

It is difficult to ascertain the general approach of the Family Court to services orders and the extent to which they can be used to address and ameliorate the care and protection/care legacy of a child. The cases noted above would suggest that there is an acceptance of the need to ensure that these legacies are addressed where appropriate and that the Chief Executive has a duty in this respect. However, there are few cases coming before the Family Court and there have been no cases at appellate level to give guidance in this respect. In one recent instance of an existing services order requiring the Chief Executive to ensure that the child received appropriate teacher aide support from the Ministry of Education and orthodontic treatment, the Chief Executive had assisted in both respects but was looking to the Ministry of Education to assume responsibility for providing the teacher aide and to fund that. This was notwithstanding the review of plan report filed with the Court noting that

1325 See *PFMB v JJB and Chief Executive*, above n 1326, and further discussed below. This is a decision of Judge Coyle who in a number of decisions has, in obiter comments, made his position clear. In this instance the caregiver (grandmother) had agreed to a discharge of a services order. She now resiled from that. As a superannuitant she was not able to fund the adequate care of her grandchild who was permanently placed and who had lived with her for 10 years. The child had a diagnosis of a reactive attachment disorder. The application was initially opposed by the Chief Executive but the order was reinstated by consent. The Court expressed concern that the grandmother was, because of financial pressure, being forced to reconsider whether she could continue to care for her grandmother. This was described as an outcome that would have been “reprehensible and if that was occasioned by the intractability of a policy of the Ministry of Social Development which resulted in Mrs B being unable to fund the care of H, then that would be morally reprehensible in my view”, at [7], and at [14] the judge commented: “Mr Beamish [counsel for the Chief Executive] indicates that issue has not formed part of the discussions thus far but if it is raised consideration will be given by the Ministry to assistance. I share Mrs Beck’s [counsel for the applicant] scepticism as to whether there will in fact be any willingness to provide any further financial assistance.

1326 See *Chief Executive v Cass and Cook* FC Papakura FAM 2003-055-429, 17 October 2012, discussed further below. Another instance is *Child Youth and Family Services v DSWH* FC Manukau, FAM 2004-092-2249, 7 April 2008, where this writer as counsel to assist the Court made an application for a services order for the purpose of meeting all or a portion of the costs of the child in attending school. The child had been removed from the care of her parents (together with a sibling) and had recently been returned. The Chief Executive wanted to discharge the existing s 101 custody order. It was in that event that the services order was sought (as the cost of school would otherwise be the responsibility of the Chief Executive). The parents were new immigrants, were facing deportation, and had significant debts. The child was well settled in school, but had a significant health issue as well. The s 101 order was discharged and the services order made. This was notwithstanding the opposition of the Chief Executive “as much from policy perspective as any other.” (At [44]) The Chief Executive queried why the welfare system, as opposed to the parents or any other agency, should meet the costs of the child attending school. The Court noted that it was a “peculiar” case and there was an understanding of the position taken by the Chief Executive. However, the Court could not lose sight of the overall welfare and interests of the child which “must take precedence”. (At [46]) It was not impracticable for
the child does need learning support and assistance at school with his social behaviour. Lawyer for child provided the Court with information from the school which supported the proposition that the child’s need for teacher aide support was unlikely to diminish but would grow, particularly when the child started secondary school at the end of 2013. At a judicial conference the judge, in noting this background, went on to say – without the benefit of argument – and mindful of the inherent contradiction in the proposition advanced:

[14] It seems to me that the issue of education support is one for the Ministry of Education not the Ministry of Social Development, and it is a matter that they should be looking at with high priority, particularly given J’s special needs and the work that has gone in thus far from the Ministry of Social Development to provide that assistance. It would be extremely detrimental to J and certainly against the principles of the CYPF Act if John was left in a breach position. However, I have to balance that against the fact that this is a Ministry of Education obligation.

The judge acknowledged that for the Chief Executive to allow this child to slip between the cracks and not have his education deficits addressed would be contrary to the principles of the Act. However, the Court nonetheless proceeded on the premise that the task of remedying the problem lay other than with the Chief Executive. Whether that is so or not, the obligation on the State to ensure this child receives the support he requires and for this to be delivered to him by responsible state agencies is not being met. If the primary responsibility is that of the Ministry of Education, but there remains a gap between what the child requires and what can be delivered, then the task of the Chief Executive is to meet that difference. The case was settled by consent with the Chief Executive agreeing to meet the costs sought.

In contrast, is the decision of *PFMB v JJB and Chief Executive* where the judge opined:

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the order to be made; the parents should contribute half of the education costs (which were significant as the child was enrolled as an international student).

1327 *Chief Executive v Cook and Cass*, above. The child is in the care of his grandparents. The judge acknowledges that for the Chief Executive to allow this child to slip between the cracks and not have his education deficits addressed would be contrary to the principles of the Act. However, the Court nonetheless proceeds on the premise that the task of remedying the problem lies elsewhere.

1328 See above, n 1326.
[12] The State has seen fit to intervene in H's life and sought a declaration from this Court that H was in need of care and protection. In accordance with the statutory obligations, the State has placed H with family and there seems to be no dispute that that placement is ideal for H and she is thriving in Mrs B's care. Having taken those steps, it seems unacceptable that the State then seeks to wash its hands of any fiscal responsibility for H because of policy considerations, the exact drivers of which are unclear to me.

[16] I have set out matters in detail as I want the Ministry to be under no illusions that this Court takes its constitutional role seriously, but more particularly it takes seriously its statutory obligation to put in place orders that are in fact in the best interests and welfare of children.

[17] As I have expressed to Mr Beamish, there is a concern by the local Judges of this Court as to the plethora of conflict that seems to be arising at present in relation to proceedings where the Ministry seeks to discharge orders under the Children, Young Persons, and their Families Act, placing responsibility on the care of whānau or foster caregivers with disputes then arising in relation to on-going funding. This Court, faced with those disputes, will look at each individual situation and assess each individual situation on its merits. This Court is not constrained by policy but simply by an obligation to recognise our international obligations and statutory obligations in relation to children in care.

There are instances where, because the Chief Executive will not provide support, caregivers decide to continue under the CYPF Act. It is not at all clear whether this is a common occurrence. However, \textit{Re R}^{1329} was one such case. The applicants were the grandparents and in receipt of the pension. They were caring for two grandchildren. One of the children had a status with the Chief Executive (which the Chief Executive sought discharge of), but the other did not as this was an informal family placement. The applicants sought an order to ensure they would not be any worse off financially after COCA orders were made and sought a services order giving them the equivalent of the quarterly board payments previously received and a contribution to the education costs of the child. The Chief Executive refused. Rather than go to a difficult defended hearing, the applicants withdrew all of their

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\textit{Re R FC Manukau FAM 2003-004-000330, 2007}. This writer was counsel for the applicant grandparents. I have acted for caregivers in at least one other case where, in the end, immediately prior to the hearing the application was withdrawn.
applications, leaving the status quo intact i.e. orders under the Act with the consequential outcome that the Chief Executive remained liable for all childcare costs.

What has not yet been argued in these cases is the application (at least by analogy) of the English case of *R (G) v Barden London Borough Council*\(^\text{1330}\) where it was held that s 17 of the Children Act 1989 created a general duty on local authorities to provide services to children in need as a class, but that this general duty was not enforceable by any individual child who may be in need as it is for the local authority to decide when to assess needs and to then intervene as it thinks fit.\(^\text{1331}\) The case concerned accommodation for children in need; it was argued that there was an obligation to assess the needs of the children and then to meet those needs once they had been assessed. Rather it was held any duty was owed generally, not specifically, and there was no obligation to meet every assessed need of the child. This involved consideration of the distinction between statutory powers and statutory duties – the former need not be exercised, but a duty must be discharged.\(^\text{1332}\) As the duties of the Chief Executive are expressed as being subjective and therefore discretionary,\(^\text{1333}\) it might have

\(^{1330}\) *R (G) v Barden London Borough Council* [2004] AC 208 (HL).

\(^{1331}\) I am grateful to Dr Robert George of Oxford University for alerting me to this case. Section 17 of the Children Act 1998 places a duty on local authorities to “(a) safeguard and promote the welfare of children within their area who are who are in need; and (b) and so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs.” Section 17 (1) (b) goes on to emphasise the importance attaching to the promotion of the upbringing of children need by their families.

\(^{1332}\) *R (G) v Barden London Borough Council*, above n 1332, at 219, per Lord Nicholls of Birkenhead. In the case of the Children Act, the relevant part has been described as a “central plank in that legislation’s endeavour to reduce state intervention in the essentially private domain of family life the duties it contains are designed to keep the compulsory measures under subsequent Parts of the Act to a minimum by providing support measures that avoid the need to have recourse to those compulsory measure”. John Murphy “Children in Need: the limits of local authority accountability” (2003) 23 Legal Studies 103 at 104. Murphy goes on to say at 119 that the “critical point” is that the Act is not designed to compel the local authority to ensure that every child in need is catered for. Rather, and having regard to resources, the local authority is expected to prioritise the provision of support services to children in need with the consequence that such children “can assert no more than an eligibility for support services”. The local authority argued, and this was accepted by the majority, that there was no duty under s 17 of the Children Act 1989 to children in need (only a discretionary power) and therefore there was no duty to assess the needs of any who was in need. Even if the assessment was undertaken, there is still no duty to act on its findings. The dissenting speech of Lord Nicholls in the *Barnet* case makes the salient point that a general duty to protect children in need makes little sense unless it constitutes a duty to all children who are in need. However, it is nonetheless appropriate to recognise that there are questions of degree and consequently some possible claimants may not be able to establish a claim. Whether they can will depend on the nature and circumstances of the case. However, that is not to deny the existence in the first instance of the existence of a duty to all children in need. The view expressed was that if s 17(1) imposed a duty to take reasonable steps to assess the needs of any individual child, then it was equally apt to impose a duty to provide a range and level of services “appropriate to those needs (at 223-224).

\(^{1333}\) Section 7(1) provides that it is the duty of the Chief Executive to take such positive and prompt steps as will “in the Chief Executive’s opinion best ensure” that the objects of the Act are attained and that this occurs in a manner consistent with the ss 5 and 6 principles. This raises issues relating to the nature and extent of statutory
been expected that this argument might have been forcibly advanced in cases involving services orders. This has not yet occurred.

12.8 The vehicle for delivery

It is at the point of transition for children from having a status under the Act to one under COCA that consideration needs to be given to the framework used to deliver the supports. These can be both formal and informal. Firstly, there are orders under the Act - services orders being made against the Chief Executive under s 86 or the appointment of the Chief Executive as an additional guardian under s 110. The informal vehicle involves the use of s 389 of the Act whereby the Chief Executive exercises discretionary power to assist.

12.8.1 Services Orders

Section 86(1)(a)-(b) empowers the Court to make an order requiring the Chief Executive to:

\[ \text{... provide such services and assistance ... to a parent or guardian or other person having care of the child or young person [or] ... to the child or young person.} \]

This order, and the related support order, have been described as “important and valuable” and “often misunderstood both within and outside” CYFS. Services orders are intended to provide long-term assistance where care and protection and care legacy issues exist for a child and assistance is required to remedy those issues. That this is the case is reinforced by the fact that a services order, unlike a support order, is not subject to expiry after 12 months. A services order will continue unless earlier discharged by application for the purpose until the child attains the age of 17 years. This is an anomalous outcome as a guardianship order and a restraining order may continue in force until the child attains 20 years. Where it can be shown that there continues to be a care and protection need (in addressing the dual legacies of the child) that support should not cease by virtue of the child reaching 17 years of age, when these other orders may continue; the consequence is a

\[ \text{powers/duties and the resources that are allocated to fulfil those duties and the rationing of those resources. See the discussion in Chapter Seven relating to public policy.} \]

1334 Using the power in s 112 for an order under s 110 for appointment of the Chief Executive as an additional guardian for specific and discrete purposes.

1335 Atwool, above n 725; Atwool, above n 920.

1336 Inglis, above n 183, at 700.

1337 Section 91(1) provides that a support order when made requires the person or organisation named to provide that support must is to do so for a period not exceeding 12 months, as is specified in the order. A support order is therefore short-term in its essential nature.

1338 See Chief Executive v Helling & Kingi FAM 2002-092-443, 6 November 2012.

situation which is “neither logically satisfying nor satisfactory.” This needs to be remedied.

Prior to the passing of the Children, Young Persons and Their Families Amendment Act 1994, a services order did not have to be formally reviewed if it solely involved the provision of financial support. All services orders, irrespective of their content, must now be reviewed by the Family Court at intervals prescribed by the Act. In cases of permanency where COCA orders have been made this requirement is unnecessarily obtrusive: social workers have to go out and visit the family; the child might be interviewed by the social worker and a lawyer reappointed to represent the child might feel obliged to make inquiries, including meeting with the child. As COCA orders have been made by the Family Court, there is absolutely no need for social workers (or lawyer for child for that matter) to go and interview the child in respect of the ambit of the services order. It is this writer’s experience not that uncommon for social workers and lawyers to talk to children about the placement. Why this happens beggars belief given the Court has made orders that sanction the child’s permanent placement under the COCA framework. A further concern sometimes expressed by social workers is that as the review documents must be served on the birth parents, this could be an incentive for them to again become involved. This led to the push to use orders for guardianship, or for no orders at all, but requiring caregivers to rely on the discretion conferred by s389 of the Act.

1340 Inglis, above n 183, at 701-702. The issue arises through definition of a “young person” in s 2: unless the context requires otherwise, this is a child of or over the age of 14 years but under the age of 17 years.
1341 Section 20(1) of the Children, Young Persons and Their Families Amendment Act 1994.
1342 See s 134(1) at n 95 above. This requires any initial plan prepared under s 128 and where any of the orders specified in s 128(2) made to then be the subject of formal review by the Family Court. This is in contrast to an order appointing the Chief Executive as an additional guardian, hence the ostensible attraction of that order. There have over the years been a vast number of services orders made. These have embraced a wide range of services to children and families (not all are permanency cases). Any form of services may be specified. These are generally financial but do also embrace other types of assistance — counselling and therapy for example — to assist the child in addressing the care legacy. See Al-Alawi, above n 511, (at NT 10.3 of the text) and James above at n 242 (paragraph 6.578 of the text) for examples of instances and situations where the orders have been made.
1343 It is the practice of this writer (and others, but not all) as lawyer for child not to visit a child on a review of a services order. Atwool, above n 725; Atwood and Gunn, above n 506, at 45 refer to CYPF reluctance to use services orders for these reasons – having lawyers and social workers visit the family makes the child continue to feel the stigma of being CYFS kids, as well as the fact of a review being necessary in any event and the need for a social worker to remain allocated to the case for the purpose of writing the report.
1344 These are discussed immediately below (chapter 12.8.3). See also the discussion in chapter 14.3.4 concerning the Vulnerable Children Bill (2013) and the intended abolition of the use of services orders in permanency cases.
Practice, however, varies.\textsuperscript{1345} It seems there is a preference to use the services order given that it is an order that must be reviewed. The rationale for this rests on the following analysis: the orders are specified in the review of plan filed in accordance with s130 of the Act. This specifies the time duration of the order and it is open to formally review the need for the order at the next review. The unstated implication is that when this review next occurs, the Chief Executive will seek discharge of the orders on the premise that there are no care and protection concerns, and/or during the currency of the review period the order has not been called upon, apriori proving there is no need for it. However, in a recent decision the Family Court held that for a services order to have its terms altered there must be an application to vary filed under s 125. Variation cannot occur simply by filing an amended plan that purports to do this.\textsuperscript{1346} It can also be noted that the 2011 paper “Reviewing the Family Court: A Public Discussion Paper specifically posed the question whether children who are not in state or organisational care should continue to be the subject of reviews of plan or whether this should only be at the direction of the Court?\textsuperscript{1347}

12.8.2 Additional guardianship

If the Chief Executive is appointed as a guardian to provide services, there is no guardianship function being fulfilled or served.\textsuperscript{1348} The only advantage is that such orders do not have to be reviewed. That guardianship is an inappropriate vehicle to use was highlighted in MB v Chief Executive\textsuperscript{1349} where counsel for the Chief Executive advised the Court that a services order “does not fit well with the Chief Executive” because of the obligation for the order to be reviewed and with this being a “poor use of resources”\textsuperscript{1350} where a child has been permanently placed.\textsuperscript{1351} For this reason appointment was sought as additional guardian for specific purposes. Lawyer for child argued (correctly) that the payment of legal costs in

\textsuperscript{1345} It has been the experience of this writer that for a period of time (through till late 2011) both the Chief Executive and the Family Court were prepared to appoint the Chief Executive as an additional guardian for the specific purpose of providing financial services in preference to services orders given the absence of any duty to review. That practice appears to have stopped and a preference for services orders has emerged.

\textsuperscript{1346} Chief Executive v Helling and Kingi Auckland FAM 2012-092-443, 6 November 2012. The writer as lawyer for child sought this outcome.

\textsuperscript{1347} Reviewing the Family Court: A Public discussion Paper, Ministry of Justice, Wellington, at 61-62. The subsequent bill enacting the reforms was silent on the point. However, see the discussion in chapter 13 as to the possible impact of the Vulnerable Children Bill.

\textsuperscript{1348} See s 15 of CCOA for the definition of guardianship, reproduced in Appendix Two.

\textsuperscript{1349} MB v Chief Executive Waitakere FAM 2005-090-2079, 9 December 2010.

\textsuperscript{1350} As a social worker will have to go out and prepare a report for the plan.

\textsuperscript{1351} At [5]. The court was advised that some judges had accepted the practice as being appropriate. The judge disagreed. It was a new experience for the judge who had to that date only experienced services orders being used for the delivery of post permanency supports. See [2].
respect of future legal proceedings being faced by the caregivers could not involve a matter of guardianship. The answer for the Chief Executive was to effect a change in the legislation not to use an order that was inappropriate for the desired purpose.

12.8.3 Section 389
This provision gives the Chief Executive discretionary residual power to provide financial and other assistance to any person for the purpose of assisting that person to care for any child where the child has ceased to be subject to custodial or guardianship status under the Act (as well as where there have been services or support orders in force) and “who, in the circumstances of the particular case, is in need of special assistance.” Section 389 involves the exercise of discretion by the Chief Executive. There can be no guarantee that in any given instance he will agree to exercise that discretion in favour of the child and/or the new family.

The Family Court has expressed its disenchantment with such an option:

> Counsel for the Chief Executive proposes future litigation costs be met pursuant to s.389 rather than a s.86 services order. I disagree. Counsel’s submission referred to above [para 55] leave such a wide discretion with the Chief Executive that the [caregiver’s] confidence in support and commitment to the day to day care of the children would be undermined by anxiety about meeting legal expenses.

Further, it would appear that attempts to address the discretion issue by (for example) having the agreement secured by a deed will not work as being in breach of the Public Finance Act. The rationale lying behind the use of s 389 and/or the appointment of the Chief Executive as an additional guardian lies in the desire to avoid the filing of review documents with the Family Court.

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1352 For that was the specific content of the order. Any other order for solely financial support falls short in that respect as well.
1353 Atwool, above n 725 and Atwool and Gunn, above n 506, at 44 also refer to the Chief Executive being appointed as an additional guardian of the child under s 27(2)(a) of COCA. This suffers from the same objections as appointment under the Act.
1354 ACP v Chief Executive of Child, Youth and Family Services, above n 581.
1355 This writer proposed the use of a deed in one case of permanency. The proposal was rejected on the grounds noted.
12.9 Conclusion

The rights and interests of children in permanent care in having their dual legacy satisfactorily addressed remains a matter of contention. The Chief Executive all too often only pays lip service to the rights of the child in terms of Articles 9.3, 18.2 and 20 of UNROC — and under s 6 of the CYPF Act. This is notwithstanding the considerable literature on the issues confronting children and their new families and the need for assistance in addressing that challenge.1356 The permanency policy of March 2006 was welcomed by those working with children and their new families. It was launched with a flourish: the range of assistance that would be provided was seen as generic — without there being too many hoops for permanently placed children and their new families to jump through. Sadly, that optimism was not realised, with the policy being short-lived. The replacement 2010 Home for Life policy has, from a CYFS perspective, proven successful with most caregivers taking COCA orders and accepting the support package accompanying the policy, and with the financial burden being transferred to the individual family concerned, to other agencies or to the voluntary or community sectors.1357 In situations where the caregivers perceive the support package to be inadequate, the only solution now appears to be litigation and the obtaining of services orders, an exercise which brings those families, who need security and support, into conflict with the Chief Executive.

To provide for the effective delivery of support for the permanently placed child, the Chief Executive needs to address a number of issues all of which are related and which cannot be dealt with as discrete items: firstly, a change in emphasis in approach – which is reflected in the practice of social workers when they engage with families and children about the rhetoric espoused in Ministerial statements and policy announcements. Secondly, and again dealing with the gap between what is said to occur and what happens in reality, is the need for more work to be done in effecting a seamless delivery of services from governmental agencies to those children in need of assistance. This is particularly so in the education sector which is where many of the problems arising from the child’s dual legacy are manifested and which

1357 Brown, above n 168, where there is considerable discussion as to the fiscal and economic impetus driving the Act at the time of its introduction. (The Act was seen as a cost-saving measure as reflected in a decrease in annual budget levels despite the annual increase in notifications).
required costly intervention in order to sustain the child in school and improve their learning outcomes.

The next chapter discusses the various themes raised throughout this thesis as they pertaining to the responsibility the State owes to the children in its care and considers areas of reform that need to be considered in order to ensure that the responsibility in question is carried out and the needs of children who are in care are met.
CHAPTER THIRTEEN

RESPONSIBILITY AND REFORM

13.1 Introduction
Responsibility lies at the heart of this thesis. This chapter considers responsibility within the overarching themes of the statutory framework and the concept of permanency. It then proposes specific areas of reform that if achieved would significantly improve the situation for children in care.

13.2 Responsibility
The question of the responsibility that the Chief Executive owes to children who are in his care and who cannot be returned to the care of their parents was discussed in Chapter Four. It was shown that these children must either be found new families, or be cared for in some other way, and then be assisted in their passage from state care to independence as functioning adults. The Chief Executive is in precisely the same position as Hart’s ship’s captain, having the responsibility for the performance of his crew (the social workers) and the safety of his passengers (the children who have been placed in his care) both during their voyage through care and their successful disembarkation from that ship. This responsibility is both contemporary and prospective, arising as a matter of law and running from the time the order is made placing a child in the Chief Executive’s custody, as was discussed in Chapter Six. This continues, if necessary, up to the time when the child moves into adulthood. Notwithstanding that there is a ‘subjective’ aspect to the performance of the duties of the Chief Executive, as set out in s 7 of the CYPF Act; they still provide an appropriate and measurable benchmark.1358 The responsibility that the Chief Executive has and must aspire to is what the “best and wisest parent wants for his own child, that must be what the community wants for all of its children”,1359 with the added emphasis that this must be that ‘best and wise’ parent who has assumed care of the specific child in question. This

1358 As seen, the Chief Executive is to “take such positive and prompt action and steps as will in his opinion best ensure that the objects of the CYPF Act are attained and that those objects are attained in a manner consistent with the principles set out in ss 5 and 6 of this Act.” See Appendix One.
1359 John Dewey from School and Society, 1907, cited in How Does Foster Care Work? International Evidence on Outcomes, above n 26, at 15. The quote goes on: “Any other ideal for our schools is narrow and unlovely; acted upon, it destroys our democracy”.

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parent will seek to ensure that the care and protection and care issues that led to the child entering state care are remedied and he or she is able to embark on adulthood able to live the best life possible. The duty owed by the Chief Executive therefore exceeds that usually expected of a parent.

The prospective nature of responsibility means that the provision of care to children not only incorporates goals of safety and stability in placement, but also extends to their overall well-being which “encompasses developmental, health, and educational outcomes, familial and social outcomes and social relationships along with emotional development.” It is imperative in the exercise of this responsibility that the best possible caregiver for the child is selected. This has a direct relationship to the quality of the social work intervention that is undertaken by the delegates of the Chief Executive, which includes a high level of expertise in permanency planning associated dynamics, and an understanding of the role of research and evidence. As the discussion in chapter eleven has shown, high quality permanency planning is essential: firstly, in identifying the short, medium and long-term needs of the child and, secondly, in the provision of necessary supports for the child and the new family to avoid possible placement failure. This requires good social work practice, which has two fundamental aspects to it: firstly, supporting the caregivers in enabling them to parent effectively and managing their anxieties in order to give them the necessary secure base from which they can effectively undertake the task they have assumed and, secondly, in doing this, providing the necessary secure base for the caregiver to, in turn, provide the child with a secure attachment and nurturing care. This is consistent with Sinclair’s research highlighting the “quality of placements empathizing children’s subjective sense of belonging

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1360 The Forward to How Does Foster Care Work? International Evidence on Outcomes, above n 26, at 15.
1361 This is a further theme noted in the literature. See for example, Carolyn Davies and Harriet Ward Safeguarding Children Across Services (Jessica Kingsley Publishers, London, 2012); Munroe, above n 990, at Chapter Six “Developing Social Work Expertise”; Schofield and Beek, above n 515, at chapter 6 where the needs assessment (of the child) and the matching (child to caregivers) processes are discussed; Mel Smith, above n 958; Thomas, above n 672, at 139-140, refers to the factors which go to making a successful placement “remaining elusive”. The older the child at placement, the less successful the placement is likely to be; so are placements where there are children close in age to the permanently placed child. Much depends on the matching process undertaken to choose the caregiver for the particular child and the need to manage and support that placement; Yates, above n 828.
1362 Schofield and Beek, above n 515, at 35.
1363 Schofield and Beek, above n 515, at 66. See Chapter 9, “Supporting foster families to provide permanence.”
to the foster family and enacted commitment of carer and child to each other.”1364 The task is that of making sense of the child’s history, of his or her present situation and then forming an assessment of the child’s “development trajectory” through to adulthood.1365

The nature and extent of permanent placements that collapse in New Zealand is unknown.1366 Atwool’s literature review cites English studies recording considerable placement disruption occurring when the child was older at the time of placement and with this being exacerbated for adolescent children.1367 The selection of caregivers is an exercise that requires transparency, and an adequate range of options. It is imperative that caregivers are given a frank narrative about the extent of the care and protection history of the child they are considering assuming care of. Placement disruption occurs more often when social workers have not been upfront with the necessary information for caregivers about the child. Research evidence shows that when advice was given that certain behaviours were to be expected, caregivers were better able to deal with those challenges as they were within the range of expectation.1368

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1364 Richard P Barth and Elizabeth Fernandez “A Synthesis of Research Findings and Direction or Policy, Practice and Research in Foster Care” in How Does Foster Care Work? International Evidence on Outcomes, above n 26, at 301.
1365 Schofield and Beek, above n 515, at 35, emphasis in original.
1366 A request made to the Chief Executive for these statistics and advice given that these statistics are not available.
1367 Atwool, citing J Thoburn and J Rowe “A snapshot of permanent placement” (1988) 12(3) Adoption and Fostering 29-34. They reported that 22% of placements collapsed in the 18 months to 5 years following placement. In a study of children aged between five and eleven years of age who had been permanently placed 92% were still with families after one year and 71% after six years. See also Rushton and Dance “The outcomes of late permanent placements” (2004) 28(1) Adoption and Fostering 49-58; Alan Rushton and others Siblings in Late Permanent Placements (British Agencies for Adoption and Fostering, London, 2001). It appears from the literature that children of and over the age of 5 years at the time of placement will be considered as a “late placement” with the accompanying risks associated with securing that placement. Rushton and Dance, above n 910.
1368 Elaine Farmer “Fostering Adolescents in England: what contributes to success?” in How does Foster Care Work? International Evidence on Outcomes, above n 26. A significant factor in placement success was whether or not social workers had been transparent with the caregivers about the child who was to come into their home. Foster parents were able to deal with behaviour that had been told could be expected. Placement disruption was greater when this had not occurred. It is this writer’s experience in representing many caregivers in permanency cases that the actual experience of parenting the child who has come into their family is a far more difficult and complex task than they were told it was going to be. This lead in turn to concern that the support being offered by the Chief Executive is insufficient.
13.3 The legal framework and responsibility

In the usual course of events, a parenting order is made when the parents of a child separate and it is necessary for the Court to settle the child care arrangements for those parents. The conceptual underpinning in relation to a parenting order – what is required of a parent of a child – for example, of Jolene in respect of Shanaia – applies when the Chief Executive assumes custodial status: he has precisely the same rights, powers and duties in respect of parenting Shanaia as did Jolene. The statutory framework is unequivocal in prescribing the responsibilities that the State has to permanently placed children. The Chief Executive steps directly into the shoes of Jolene and has the same duty of care towards Shanaia as Jolene would have had but for the s101 order having been made\textsuperscript{1369} and, having intervened must address and remediate the care and protection issues. The Act does not go onto detail at all how that parenting role is to be undertaken. Given the reference to COCA there is no need.\textsuperscript{1370} However, COCA itself does not provide an understanding of what it is to be a parent, other than by implication from ss 4 and 5 as to the factors that go to the welfare and best interests of a child\textsuperscript{1371} and related case law.\textsuperscript{1372}

The responsibility that flows is not to be read down in any way, so that the expectation is that the Chief Executive only provides what is, at best, a minimally acceptable standard of care. Rather, the duty is two-fold: firstly, to provide a standard of parenting, including placements through the child’s journey in care that are safe and as few in number as possible before a final and lasting home is found, and secondly, to provide at the same time, the appropriate therapeutic intervention that is required and for as long as that assistance is needed. This is done to ensure that a child like Shanaia has a permanent placement that is not unnecessarily jeopardised by her caregivers finding the stress of parenting her simply beyond them and so

\textsuperscript{1369} To reiterate, this arises in two respects: firstly, by the declaration in s 104(1)(a) as to the effect of a custody order being as if a parenting order had been made under COCA and, secondly, by the suspension of Jolene’s ‘rights, powers and duties’ as is provided for by s 104(1)(b) and with those rights, powers and duties being of ‘no effect’.

\textsuperscript{1370} Other than for emphasising the nature of the obligation that is due.

\textsuperscript{1371} Although the role is prescribed by s 104 of the CYPF Act as being the same as if a parenting order had been made, one important distinction must be noted: the Chief Executive is bound by the principles of the CYPF Act and not by those prescribed in ss 4 and 5 of COCA. However, the two are not mutually exclusive and there have been instances where in determining a case under one or other of the statutes, a Court has made reference to the welfare and best interest principles of the other. For example, the Lexis Nexis commentary, at 6.117, cites the cases of \textit{H v H} FC Papakura, FP 057/24/94, 3 February 1994 and \textit{Department of Social Welfare v Robert} FC Auckland, FP 122/93, 1 February 1995 as authorities for this. (James, above, n 242.)

\textsuperscript{1372} As discussed above at chapter 6.14 at 148 under the heading “A parenting checklist.”
that, when adulthood arrives, she is as best equipped as possible for that next stage of her life.\textsuperscript{1373}

A final and collateral question must also be addressed: does it makes any difference whether the agency having custody of the child who is to be (or already is) permanently placed, is the Chief Executive/Director of a Child and Family Support Service or an Iwi or Cultural Social Service as opposed to the Chief Executive?\textsuperscript{1374} It does not. The duties apply across the board as a matter of law as s 104(1) of the CYPF Act provides that when an order is made under s 101 placing the child in the custody of ‘any person’, the consequences that are outlined in the section apply. However, a conundrum arises when that other agency finds itself in a position where it cannot continue to provide care.\textsuperscript{1375} In such instances, the task must default back to the Chief Executive as it is the Chief Executive who has the duties and responsibilities required by s7 of the CYPF Act to ensure that the objects and principles of the Act are attained and carried out in the manner prescribed.

\subsection*{13.4 The ultimate goal}
With regard to the ultimate goal of ensuring the best outcomes for children in care, particular guidance in this respect can be derived from the report \textit{Improving the Transition: Reducing Social and Psychological Morbidity during Adolescence}.\textsuperscript{1376} This was prepared at the request of the Prime Minister on how to improve outcomes for young people in their transition from childhood to adulthood. It extends beyond children in care, but obviously embraces them. The report notes that although a “comprehensive understanding of the factors that put an individual young person at risk is not possible … this does not mean that we lack a strong evidence base of what would reduce risk across our population of young people”.\textsuperscript{1377}

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\textsuperscript{1373}See Chapter Six and the discussion under “The principle of minimum intervention.”
\textsuperscript{1374}It is more usual for the actual social work responsibility for a child in care to become the task of these groups with the Chief Executive retaining legal status. However, it is not uncommon for them to also take legal custodial (and guardianship) responsibility as well.
\textsuperscript{1375}This is a real issue. The writer undertakes legal work for an NGO which from time-to-time assumes legal responsibility for children who are placed with its caregivers. An issue arose in 2013 in respect of a 13 year old child who disclosed that the son of her NGO caregiver had indecently assaulted her. The NGO removed her but could not find a new placement from within its resources. The Chief Executive refused to intervene, saying that the absence of a safe placement for this young adolescent was not a care and protection matter. With some cajoling, the Chief Executive agreed to enter into a s 139 temporary care agreement with the NGO so that a temporary safe placement could be obtained. This was at best marginal as a matter of law as it is debatable whether a Child and Family Support Service/Iwi Social Service/Cultural Social Service can enter into a temporary care agreement with the Chief Executive given the language of s 139 of the CYPF Act.
\textsuperscript{1376}Gluckman and Hayne, above n 728.
\textsuperscript{1377}At viii.
\end{flushleft}
However, it then observes that an “evidential approach is not being systematically used to decide what programmes to offer and which to maintain.”\textsuperscript{1378} The task involved in addressing these issues requires “sustained effort over multiple electoral cycles” and requires agencies to reduce operating in silos and integrate work across ministries.\textsuperscript{1379} The report identifies that brain maturation is not complete until well into the third decade of life and that adolescence is a process is influenced by the early onset of puberty and is a period of risk-taking and, for many, this is a healthy process. The issue is for those children who are not able to develop the necessary functions of self-control and who make poor decisions with corresponding negative consequences, including a high proportion of children suffering from depression, other mental disorders and there being a high adolescent suicide rate. These are common problems for children in care. The report identifies that remediation in adolescence is not as effective as prevention.\textsuperscript{1380} Social investment should therefore take more account of the “growing evidence that prevention and intervention strategies applied early in life are more effective in altering outcomes and reap more economic returns over the life course than do strategies applied later.”\textsuperscript{1381} The message from this is two-fold: firstly, that children in care, who are already profoundly vulnerable, have the issues of adolescence overlaid on their care and protection concerns, and secondly, that in addressing those matters, due regard must be had to the relevant literature in order to inform policy development. In this respect, there a “marked homogeneity” in the risk factors that face young people and, accordingly, there is a “need to distinguish programmes that are appropriate for all young people from those that should be targeted at individuals or families who are particularly at risk.”\textsuperscript{1382} Failure to recognise these dynamics must exacerbate the risks posed for a successful and sustainable permanent placement

\textbf{13.5 Permanency and responsibility}

The thesis has considered both what constitutes permanency and related planning, including the question of whether private law orders are required to be taken by the new caregivers to effect permanency, and the issues surrounding the current legal structures that are utilised. That the Chief Executive has a policy requiring caregivers to take formal Court orders fails to
have sufficient regard to the needs of individual children and their specific circumstances.\textsuperscript{1383} I argue that it is not necessary, as a matter of \textit{a priori} logic, for the caregivers to do so.\textsuperscript{1384} Rather, what is critical is that the ‘perception of permanency’ is in place as a reality for the child and caregivers.\textsuperscript{1385} Social work practice should have, as its overarching priority, the goal of ensuring that this family is viewed as the primary source of nurture and security for the child and that there is ongoing support for the family providing that care. Research evidence indicates that stable and well-supported fostering\textsuperscript{1386} produces good outcomes for children, comparable to adoption.\textsuperscript{1387} Equally, it will, in most instances be necessary that the child no longer carries the stigma of being a child in care, of being different from other children in the same home or within peer relationships.\textsuperscript{1388} The responsibility owed by the Chief Executive is to therefore be attuned to the child’s individual needs.\textsuperscript{1389}

Where a private law framework is implemented, this needs to be one that is conceptually and practically appropriate for the permanently placed child and their new family. Significant issues have been raised in this thesis with respect to the current COCA framework: orders made for day-to-day care may be challenged and discharge sought; there may be disputes over contact; the new parents, whilst appointed guardians, must as a matter of law consult and make joint decisions with the other guardians of the child (including the birth parents), with there being the potential for guardianship disputes. Although anecdotally the reality is that there are few, if any, occasions whereby caregivers are challenged through the Family Court once COCA orders are made, the concern remains.\textsuperscript{1390} It is therefore the responsibility

\textsuperscript{1383} All things otherwise being equal.
\textsuperscript{1384} See for example Schofield and Beek, above n 515. This was within the context of the legal frameworks that are available for permanency in England and Wales, notably adoption and now ‘special guardianship’ as provided for in the Adoption and Children Act 2002 (and which in turn amended the Children Act 1989).
\textsuperscript{1385} As discussed in Chapter Eleven. See for example Lahti, above n 1015 ; Sanchez, above n 1045; Schofield and Beek, above n 515; Sinclair, above n 1047; June Thoburn “International Perspectives on Foster Care” in \textit{How Foster Care Works? International Evidence on Outcomes}, above n 26, at 29.
\textsuperscript{1386} I use ‘fostering’ here in the generic sense as including placement that is both fostering with the child’s legal status being the responsibility of the State and where a child is placed in a family within a private law framework other than adoption.
\textsuperscript{1387} See for example, Biehal and others, above n 837.
\textsuperscript{1388} See Atwool, above n 52, at 245, and which was seemingly supported by the 47 children she interviewed.
\textsuperscript{1389} There are many competing factors at play. For example, it should not be thought that all children want to have a legal relationship with their caregivers. Atwool, above n 52, at 47 refers to the English study of Bush and Goldman (1992) who found that although children want stability in their placements they did not want to be adopted as this meant the end of their relationship with their families and of their familial sense of identity. Some children are therefore able to “tolerate a degree of ambiguity in their relationships in order to preserve the tie to birth parents”.
\textsuperscript{1390} The ‘fight’ takes place prior to the making of the private law orders.
of the State to provide a private law regime that provides the necessary security and stability for children like Shanaia. Adoption, given its legal certainty and finality, is the immediate riposte. This is the default position in England\textsuperscript{1391} and in the United States.\textsuperscript{1392} However, adoption is not now supported in New Zealand because of the consequences that flow from the making of the order. This is quite explicable given that most permanently placed children are in family/whānau placements, and noting here the significant numbers of Māori children who are in care. Adoption within that traditional orthodoxy is anathema to Māori.

As has been noted in Chapter Eight, Māori children must be given particular emphasis by virtue of the place that Māori have in New Zealand society and the number of Māori children that are in care, being disproportionate to the Māori population as a whole. The responsibility of the Chief Executive here extends to ensuring that Māori children are safely placed within their whānau and hapū and that these children are realistically supported in their whakapapa.

13.6 Reform

What is required is a more robust and conceptually sound framework of orders that will protect the permanently placed child and family. In my view reform of the law is required in two essential respects: first, by providing legal security for children who are permanently placed and secondly, by implementing policies that will ensure that all necessary resources are provided to address the dual care legacies a child may present with. It is my premise that once placed in permanent homes children must be physically and psychologically safe. At

\textsuperscript{1391} The Adoption and Children Act 2002. However, this is an answer for younger children in the main. See for example, Harriet Ward and Emily R Munro “Very Young Children in Care in England: Issues for Foster Care” in How Does Foster Care work? International Evidence on outcomes, above n 26. This noted the outcome of a study involving 42 babies who came from families with high levels of need and to whom no swift return was possible. Over half were adopted (a number were returned to birth families, as to be expected given the principles of the Children Act 1989 (as with the CYPF Act). However, some of the children were not adopted as the caregivers did not pass muster. The children nonetheless remained with them in a fostering regime. That study is also reported in Ward, Munro and Deardon, above n 896. But note that Sir James Munby, President of the High Court, Family Division, was reported by the Daily Telegraph of 17 September 2013 as expressing concern that social services departments are attempting to have children adopted without first considering less drastic measures. Under a bill currently before the English Parliament, local authorities will be under a duty to complete permanency by way of adoption within six months of the child being taken into care. John Bingham “Drive to speed up adoptions means children ‘may be removed from parents too quickly’” The Telegraph (online edition, London, 17 September 2013) <http://www.telegraph.co.uk/news/politics/10314937/Drive-to-speed-up-adoptions-means-children-may-be-removed-from-parents-too-quickly.html?>.

\textsuperscript{1392} Barth and Lloyd, above n 1176, at 48, that 50,000 children are adopted in the US from foster care, about 20% of all children who are leaving that care, and with another 20,000 having parental rights terminated as a prelude to adoption. Adoption is more likely to occur in respect of younger children who are removed at or near birth and placed between 0-six months.
the same time they need to know who they are and where they come from so that when of an age to make inquiry, they can make sense of what has happened to them. This is particularly so for Māori children. The Adoption Act, therefore, is an inappropriate vehicle to use. A third and separate area of reform covers those adolescents who remain in the care of the Chief Executive as they approach the time of leaving care but who require continuing support following this transition.

The necessary security required by the permanently placed child can be largely achieved by amendment to COCA. Firstly, there is the need to address the problem of caregivers having duties to consult and make joint decisions on matters of guardianship. This could be achieved by two possible amendments. The first is by providing that the guardianship rights of the birth parents are suspended and of no effect on the making of a parenting order for day-to-day care in favour of the new caregivers. This would require an initial evidential threshold, but not one so high that it posed an undue barrier for the applicant caregivers, and, equally, with care being taken not to marginalise the birth parents. The area of qualification with this amendment would have to be where the Court, in the first instance, has made a substantive contact order in favour of the birth parents, reflecting the Court’s assessment of the welfare and best interests of that child. If this involves physical contact beyond one or two occasions in each year then, for example, problems could arise should the caregivers want to relocate – as occurs with separated parents. The obligation here is then on the caregivers to seek the approval of the Court and this may have to be a condition of their COCA orders. It is nonetheless appropriate that birth parents know what is happening with their child – if they are so interested. This can be achieved by casting an obligation on the caregivers, wherever practicable, to inform the birth parents of decisions in the nature of

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1393 As discussed in Chapter Eight.
1394 This does no more than mirrors s 114(2) of the CYPF Act when an order for sole guardianship is made in favour of the Chief Executive. It would mean of course that the caregivers could move their residence without having to get the consent of the birth parent as guardian. In the end, not all contingencies can be taken into account and if the priority is with the securing of the child in the family in which she has been placed, the welfare of that family unit must come first.
1395 The proposed reform set out in the Vulnerable Children Bill and which is noted in the next chapter fails as presently drafted as it sets the bar too high for the caregivers.
1396 The issues here are complex: what if the child sees the birth parent six times a year on a supervised basis and the caregivers have an employment opportunity in another city or country which will be to the benefit of that family?
guardianship that are to be made (or have been made having regard to the circumstances) about the child. 1397

The second is to adopt the recommendation of the Law Commission in its 2000 Report on Adoption, for a specific framework that could replace adoption and provide a regime that would encompass, at one end, the temporary care/guardianship of children and, at the other, a reformulated concept of adoption. This would ensure that child-focused outcomes would result. 1398 The Commission recommended that a Care of Children Act be introduced and that this set out the principle of ‘parental responsibility’ - a notion incorporating both custody and guardianship (although each was separately retained within the overall framework). 1399 Adoption would also be recast so that the fiction of the child being born to the adoptive parents would be abandoned and adoption would instead involve the transfer of parental rights and responsibilities. 1400 The adoptive parents would obtain the right to care for and control the child and to make all decisions involving the child’s upbringing. These proposals were, unfortunately in my view, not adopted by the Government. Had they been then a far more robust legal framework would have resulted and that would have better met the needs of permanently placed children. Atwool, in her 2010 report, also recommended that legislative provisions be introduced to protect the new family from subsequent legal challenge or continual re-litigation over contact. 1401

The concept of ‘special guardianship’, as used in England from December 2005, provides useful guidance in this respect. Although adoption is the preferred route for effecting permanency there, this is not possible for many children including those who are older, who might have ongoing and significant relationships with their birth parents, or who have emotional or behavioural problems such that significant post-placement support is required. 1402 Obtaining a ‘residence order’ was a way of providing a framework for these

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1397 This reflects, in part, s 8 of the CYPF Act. The obligation arising would be subject to the whereabouts of the birth parents being known.
1398 Law Commission, above n 562, at [86] and [87].
1399 At [99].
1400 At [102] - [105].
1401 Atwool, above n 52, at 219. Caregivers had also reported that dealing with difficult birth families was a major stressor (being at times violent and threatening and without adequate protection being given), as noted at 137. Unfortunately Atwool did not specify whether this experience was when the children were still in the custody of the Chief Executive or after COCA orders had been made. The inference overall is the former.
1402 Ananda Hall “Special Guardianship and Permanency planning: Unforeseen consequences and missed opportunities” (2008) 20(3) Child and Family Quarterly 359-377; John Simmonds The Role of Special
However, these were perceived as being insecure and not capable of ensuring stability and effecting permanency to the extent required. This led to the development of a ‘special guardianship’, the essence of which is to confer the same rights contained within a residence order, but with the added safeguard that leave of the Court is required before any application can be made to discharge or vary the order and with the birth parents establishing that there has been significant change in their circumstances since the order was made. Special guardianship was designed to offer greater security for children and their caregivers than fostering provides where there was no reason for the local authority to continue to have legal status over the child, and to also avoid the stigma of care, but without having the legal severance issues inherent in adoption. The orders run through to the child turning 18 years of age and local authorities have a statutory duty to support those who hold the orders. Special guardianship confirms the child’s relationship with the caregivers. The ostensible attraction of the order is that in the New Zealand context it would provide security and stability for those children who were subject to it, whilst at the same time not severing the child-birth parent relationship. The presence of such an order would not be a bar to the making of an order for contact in favour of the birth parents.


Children in care in England and Wales are often the subject of a care order made under the Children Act 1989. The birth parents retain rights of ‘parental responsibility’, which in this context equates to the concept of ‘guardianship as that is used in New Zealand. A residence order confers a right to care for the child on those who obtain the order. They can be varied or revoked. The order lasts until the child is 16 years of age or until 18 years if there are special circumstances such as disability. The person possessing the residence order is able to give consent to medical treatment, travel overseas with the child and decide what school the child attends. They therefore provide a reasonable degree of security for the child who is secured in the family by a residence order. See Hall, above; Biehal and others, above n 837.

The comparison with parenting orders under COCA can be noted. Residence orders were also inadequately resourced as financial allowances payable to caregivers was discretionary and local authorities were found to be inconsistent and unreliable in their practice. Hall, above.

Special guardianship was identified by the Prime Minister’s Review of Adoption, above n 1031. It was introduced by the Adoption and Children Act 2002 and amended the Children Act 1989. It is a private law order and is not confined to children who are formally in public care, noting that in England children may be in private foster care, in local authority care on an agreed basis with their parents or subject to a care order. It is not proposed to go into detail about the order. Further guidance can be obtained from the Biehal and others; Hall, above, and Simmonds, above n 1403.

But see the decision of the Court of Appeal (England) in JJ & MJ (Mother and Father) v AT & AT (The Adopters, Neath Port Talbot Borough council (Local Authority), AJ (Child) [2007] EWCA Civ 55, [2007] WL 261159 (UKCA). Here the Court of Appeal in a case where special guardianship was rejected as an alternative to adoption and where the child was placed with an aunt and uncle and know of the reality of the family relationships, held that the making of an adoption order would not distort the family dynamics, “the question of the likely distortion of family relationships by an adoption order is very fact specific and should not be overplayed”, at [52]. The observation was also made at [53] that it was “trite law that in the twenty-first
The second area of reform is the need to prevent unnecessary applications being filed for return of the child to the birth parent (or for contact).\textsuperscript{1408} This appears to be more of a conceptual issue than a real one.\textsuperscript{1409} However, it needs to be addressed in order to ensure that the perception of permanency is reinforced. This could be achieved by amending s 47 of COCA to require the leave of the Court to be obtained before any such application could proceed. This could require an evidential onus being required whereby the applicant birth parent must satisfy the Court that the welfare and interests of the child necessitate the application proceeding. A factual matrix must also be set out: for example, there being a significant change in the circumstances of the child such as advice that the placement has failed, or is on the cusp of failing, or that the birth parents have, within a timeframe compatible with the child’s timeframe effected sufficient change such that return can reasonably be contemplated. There is a fundamental balance to be achieved here between the need to maintain the security of the placement (and factoring in the subjective perception of the caregivers) and the need for the child to have knowledge of and/or a relationship, if appropriate, with the birth parents.

The third area of reform, exemplified by Zepplin’s case study, relates to an issue for young people who are on the cusp of aging out of care yet continue to have a care and protection issue necessitating ongoing intervention by the State. This is not to overlook the needs of young people who are not placed in a new family but who are aging out of care. For many children approaching this transition from care, there is a real anxiety about what will happen century, an adoption order is not inconsistent with ongoing contact between the children concerned and their birth parents”.

\textsuperscript{1408} In respect of contact, there must be an appropriate evidential basis for the application, which should be founded on the presence of an existing contact regime, and within the overall conceptual framework that contact is not for the purpose of re-establishing the child-parent relationship to effect the return to a day-to-day care structure.

\textsuperscript{1409} See Chapter 11 above. However, the “Regulatory Impact Statement –Vulnerable Children’s Bill: Specific care and protection legislation changes” accompanying the Bill refers to there being “at any one time up to 100 Home for Life placements, or potential placements, that are being challenged or disrupted by the actions of the birth parents”, at paragraph 19. Generic examples are given of the type of problems that are caused. Examples given are the (normal duty) to consult on guardianship issues (which can expose caregivers to obstructive or abusive behaviour; that birth parents can apply to the Family Court as of right for parenting orders for day-to-day care of contact, effectively re-litigating the original decision to place the child; the need to review services orders, which can be disruptive; that “Home for Life parents and their lawyers often prefer to rely on services orders to ensure support as they can be reluctant to trust that …[CYPS] will support them and the child in the future once CYPF Act orders are discharged.” At paragraph 20 it is stated that there “are also likely to be some children living with permanent caregivers who have previously taken … orders under COCA, whose placement is threatened because of the behaviour of the parents or other guardians.” My conclusion is therefore not altered.
when they reach 17 years of age as many leave care without any supports in place.\textsuperscript{1410} This is particularly so for those children who have remained in the custody of the Chief Executive and have been in foster care or a residential placement. Some may continue living with those foster parents; whether they do or not will depend on the willingness of the caregiver to continue providing for them in the absence of financial and support work from the Chief Executive.\textsuperscript{1411}

However, the former group are particularly problematic and present significant challenges for those involved with them. The issues for these young people become particularly acute where it appears that orders under the PPPR Act will be required (but not only then).\textsuperscript{1412} In those cases where jurisdiction under the PPPR Act might exist, unless the Court invokes the wardship jurisdiction and accepts that a custodial component attaches to the order placing the young person under the guardianship of the Family Court, then a significant statutory lacuna arises.\textsuperscript{1413} The Children, Young Persons and Families Amendment Bill (No 6) 2007 (183-2), which continues to languish on the Parliamentary order paper, would address this dilemma by increasing the upper age limit for custody order to 18 years.\textsuperscript{1414} However, this is not a new issue. The Mason Report of February 1992 raised this, noting the submission of the then

\textsuperscript{1410} Atwool, above n 52. Many of these young people are now referred to specific agencies tasked with the role of assisting them in the transition from care. (The Dingwall Trust in Auckland is one such. This support can continue till the young person attains the age of 18 years. Atwool at 201 observes that in her interviews the “most positive responses came from young people in an independent agency, which provides a transition to independence service”.)

\textsuperscript{1411} Board payments and the clothing allowance payments both stop on the child attaining the age of 17 years. The following example is illustrative of the issue: I “act” for a young woman ‘G’ who is 16 years of age. (This is via her litigation guardian given her age) G is in the custody of the Chief Executive. The Chief Executive is also appointed as an additional guardian of G. G will soon be turning 17. The custody order will discharge on her turning 17 years old. G is placed with her litigation guardian who is supported by a NGO. The Chief Executive funds that NGO support. This will end on G turning 17 years old. G is also the mother of a child, ‘S’ who is also in the custody of the Chief Executive. Agreement has been reached that S, who has been in foster care will be placed with G’s caregiver as part of the process to effect the ultimate return of S to G. The Chief Executive will support the litigation guardian as the approved caregiver of S but did not agree to continue to provide the funding for the NGO to support G as part of her continuing transition from care, and with the added complicating factor of her being a mother as well – even under the auspice of the order for guardianship which can continue to G attaining the age of 20 years.

\textsuperscript{1412} See Atwool, above n 52, who at 216 makes a specific recommendation that the upper age level for automatic discharge of a custody order be increased to 18 years and that the CYPF Act Amendment Bill no. 6 be implemented.

\textsuperscript{1413} As held to be the case in \textit{Corkhill v H}, above n 106.

\textsuperscript{1414} The prima facie concern must be in respect of the costs involved in having custodial responsibility for this specific cohort of young people. This is not on the legislative horizon. The newly introduced Vulnerable Children Bill does not address that specific issue.
Department of Social Welfare which asked whether it was appropriate for that upper limit to be increased in respect of a unique:  

... small group of 17 to 19 year olds who deserve particular support and protection: those with a severe disability, often intellectual, who are neither covered by the CYPF Act or the Protection of Personal and Property rights Act 1988. It may be appropriate to provide coverage under the CYPF Act for them.

These young people are currently placed at significant disadvantage in terms of their legal rights. It is not unknown for children in the custody of the Chief Executive to be placed in a residential placement and for that placement to continue after the child attains the age of 17 years and where the Chief Executive, at best, has status as a guardian only. This order does not convey custodial powers. The young person may well have a significant intellectual disability and cannot give informed consent to remaining living in that home. In the absence of an order, the Chief Executive cannot require the young person to remain there nor can restrictions be set limiting or prescribing the young person’s freedom of movement to go out whenever he or she wants to. To do so is to breach s 22 of the New Zealand Bill of Rights Act 1990 as arbitrary detention then occurs. This is an issue that social workers struggle with – they cannot continue to make decisions that limit the young person’s freedom of action when the legal framework does not allow them to exercise custodial powers.

A more prescriptive care strategy must be implemented to address issues for this group of vulnerable young people. Firstly, the Children, Young Persons and Families Amendment Bill (No 6) 2007 needs to be enacted to the extent that it raises the upper age for custody to 18 years. This will at least remove the age lacuna between the CYPF and PPPR Acts. At the same time there needs to be a far greater emphasis by the Chief Executive on ensuring that social workers develop specific skills and expertise about children and young people with

1415 Mason, above n 611, at 78. The issue was formally outside of the terms of reference but as it had been raised by a number of organisations, it was thought necessary to draw attention to it. See also Cooke, above n 37. This article contains a more in-depth discussion about this and related issues than can be covered here.

1416 For the purposes of ss 6 and 12 the PPPR Act they would not have the requisite capacity to make or communicate decisions relating to their personal care and welfare.

1417 This is an issue that has arisen for me as counsel in a number of current cases. For example, JW is now aged 19 years and the Chief Executive is his guardian under the CYPF Act. He is living in a home for those with intellectual disabilities. Everyone is waiting for the Chief Executive proceedings under the CYPF Act to be processed by the Court. In the meantime the Chief Executive is purporting to exercise custodial powers by placing restrictions on the contact JW has with his mother, by saying if and when it can occur. The case appears to be slipping through the gaps.
intellectual disabilities and how to improve the interface between the two statutes. The only recourse currently available to ensure that a statutory framework is present is for the Court to place the young person under the guardianship of the Family Court, with the Chief Executive appointed as agent of the Court. During the course of that year the Chief Executive must take all necessary steps to effect the transition of the young person from the CYPF Act to the PPPR Act, including the obtaining of necessary reports to provide the evidential foundation for the making of the PPPR Act order and the preparation and filing of the applications. This involves working with the responsible disability sector agencies in respect of the support infrastructure required.

The second aspect of reform concerns policy formulation. Children who have a care and protection and care history and who are placed in new families not only have the usual needs of children, but also have the additional legacy that is brought about by that history. It is essential that the State addresses those legacies both through the formulation of an appropriate policy framework and through its practical implementation and operation. A specific policy relating to the care of children who are permanently removed from their families is needed and this must extend to the provision of post-permanency supports, beyond the current parameters of the Home for Life policy. However, as “‘family social policy’ is not a clearly demarcated discipline in New Zealand nor indeed in other parts of the world”, having a policy on this discrete aspect of some children’s lives unfortunately seems a remote possibility. Nonetheless, a policy which is clearly enunciated, understood

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1418 In another case, where the writer is involved as counsel for the young person, IK, the issue firstly concerned whether the Chief Executive would make an application under the PPPR Act at all. (The Chief Executive had status as an additional guardian which could remain in force till the young person turned 20 years of age.) This was not withstanding a comprehensive neuropsychological report which was clear in advising that jurisdiction under the PPPR Act existed. The Chief Executive finally made the necessary applications for personal orders under s 10 of the PPPR Act just before the young person attained the age of 20 years. On the most recent appearance at the Family Court, counsel for the Chief Executive then argued that although the application had been filed by the Chief Executive, now that IK had attained the age of 20 years, the Chief Executive’s role had finished and that someone else (not identified) had to continue the application. The issue was going to a hearing in late 2013, but the Chief Executive has now backed off.

1419 This covers the young person though to their turning 18 years of age, which is when the guardianship order expires by operation of law and is the earliest age at which a person can be made the subject of orders under the PPPR Act.

1420 Note here the discussion in Chapter 14 in respect of the intended changes set out in the Vulnerable Children Bill whereby prescribed support may be provided to young people who have left care. The proposals, though welcome, do not go far enough.

1421 The Treasury EXG Review; above n 725; Tyler, above n 1000. The High Complex Needs policy, though cumbersome and time consuming, nonetheless seems effective.

1422 Pryor, above n 577, at 1.
and acted upon would set out what is intended to occur when a child is permanently removed from their birth family, and would clearly and transparently detail the supports that would available for the child and the new family, and then provide a similarly clear and transparent legal framework to give effect to that new placement. Pryor cites Bronfenbrenner’s truism that “[T]he family is the most powerful, the most humane, and by far the most economical system known for building competence and character”. The need for a child to be a member of a family to which she is securely attached clearly emerges from the literature as a fundamental prerequisite to optimal well-being during both childhood and when that child in time becomes an adult and a parent themselves. Pryor notes three reasons why there must be concern at the impact of policies on families:

- Intimate relationships result in the wellbeing of all individuals, and policies have the potential to enhance or impede the formation and sustenance of positive family relationships;

- Well-functioning families foster the development of socially engaged and successful young people who contribute to the wellbeing of wider society.

- Well-functioning families are inextricably linked with economic productivity and flourishing workplaces. When intimate relationships are healthy, when parent-child relationships are fostered, then adults in the workforce contribute measurably more to their workplace than those whose family relationships are stressed.

This relates to families in general, with a particular emphasis on intact families who have not been disrupted by the intervention of social service agencies and experienced the removal of children. Children who have been removed from birth families most often become again members of new families (and, as adults will be members of families that they have, as a parent, assisted in creating). The three factors that Pryor notes apply with equal, if not greater, force and validity to those children who are in care and who are of an age where

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1423 As will be seen in the next chapter which briefly notes the newly introduced Vulnerable Children Bill if enacted in its current form, the Bill will fail to present a coherent and articulate policy capable of addressing in a real sense issues for vulnerable children as a whole and, more specifically, children in care.

1424 Pryor, above n 577, at 1.

1425 At 1.
placement in a new family can occur and where they do not have care and protection and care legacies that are so profound as to prevent that placement from occurring. For children who are in the care of the State and placed in new families, the task for these families in creating a sustainable family for the child is far more profound than for the family which does not have children with those issues. The role of a clear and articulate family policy, and adequate resourcing of it, is pivotal in this respect. This is a dynamic clearly missing from the New Zealand body politic.\textsuperscript{1426}

13.7 Conclusion

This chapter has considered responsibility within the overall paradigm of the responsibility that the Chief Executive has to children in his care. It concludes that this is a prospective duty which may continue through to the child attaining adulthood. This conclusion is reinforced by the report \textit{Improving the Transition: Reducing Social and Psychological Morbidity Through Adolescence}.\textsuperscript{1427} This identifies the issues that present for all children as they travel through adolescence and into adulthood and, observes that addressing the dual legacies of the child in care is a further overlay for those children. This goes to emphasise the imperative of remediating the consequences of the care and protection and care legacies, for the well-being of the child and for society. In terms of reform, I have proposed that specific and relatively minor amendment to COCA would in all likelihood provide the necessary desired security for permanently placed children. This is not because the evidence for such reform is compelling in a practical sense but rather because of the conceptual inadequacies that are inherent in COCA currently.

Chapter Fourteen discusses the implications of the Vulnerable Children Bill introduced into Parliament recently by the Minister of Social Development in August 2013.

\footnote{1426}{The recent policy announcements by the Minister of Social Policy that the government is to implement wide ranging reform in respect of child abuse covers the areas covered by this thesis in one direct respect only. This is the suggestion that some kind of special guardianship will be implemented and will be available on application to caregivers whose lives have been (are being) disrupted by birth parents over issues of guardianship.}

\footnote{1427}{Above n 728.}
CHAPTER FOURTEEN

Current Policy Context: The Vulnerable Children Bill and Reform of the Family Court

14.1 Introduction

A focus of the current government has been the issue of ‘vulnerable children’ – which includes children in care. The publication of Green and White papers in 2011 and 2012 has fostered public discussion about how best to address matters of concern for this group of children in the New Zealand population.\textsuperscript{1428} The Children’s Action Plan, part of the White Paper documentation, outlined that a care strategy for children in state care would be established.\textsuperscript{1429} This was soon followed by the Vulnerable Children Bill, the legislation to enact the proposals recommended in the White Paper. A second area of recent reform that may have an impact on the state’s responsibility to children in care concerns the changes to the Family Court being instituted by the Minister of Justice. While not specifically targeted at permanently placed children and their families, this will go some way in fending off possible legal challenges to the caregivers of permanently placed children by preventing certain prescribed proceedings being filed within specific timeframes.\textsuperscript{1430} The full

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\textsuperscript{1428} The Green Paper Every Child Thrives, Belongs, Achieves, above n 566, was released in the latter part of 2011. The White Paper for Vulnerable Children, above n 730 and the Children’s Action Plan released in October 2012 set out the consequences of that consultation and were followed by the Vulnerable Children Bill. This is discussed in more detail below.

\textsuperscript{1429} The media release advises that this would involve a care strategy for children in state care. The media release reported on two matters that were relevant for the present purposes: first, the Chief Executives of Police, Health, Education, Justice, and Social Development will have clear performance expectations to meet in being accountable for vulnerable children. (This is a wider range of children than those who are in the care of the State or permanently placed.) The intent appears to be to address the silo mentality that prevents the effective delivery of services to children. The second is to curtail the rights of birth parents who exploit the fact that they have guardianship (and prevent the new parents and the child from having overseas holiday or who drag out court cases and thereby create uncertainty for the children or who continue to have weekend visits with the child and because they are “aggressive or manipulative” seek to undermine the placement. As will be shortly noted the Vulnerable Children Bill goes far further than the media release indicated.

\textsuperscript{1430} The new s 139A of COCA will prevent an application being filed for a parenting order (for care of contact) or to amend or vary such an order without leave of the Court if that is substantially similar to a proceeding previously filed in the Family Court by any person and if this is commenced less than 2 years after the previous final direction or order was issued. Leave can only be granted if there has been a material change in the circumstances of any party to the proceedings or of the child who was the subject of the previous proceedings. The case will be ‘substantially similar’ if firstly, the party commencing the proceeding was a party in the previous proceeding, secondly, the child is the same and thirdly, the proceeding is commenced under the same COCA provision as the first proceeding, is seeking to vary the order made in that previous proceeding, or seeks
implications of this will not be known until the amendments come into force and are subject to judicial interpretation.

### 14.2 Vulnerable Children Bill

The Vulnerable Children Bill is a significant item of reforming legislation.\textsuperscript{1431} Clause 5 ‘vulnerable children’ as meaning “children of the kind or kinds (that may be or, as the case requires, have been and are currently) identified as vulnerable in the setting of Government priorities under section 7.”\textsuperscript{1432} Section 7 does no more state that the “responsible Minister may from time to time, after consulting the children’s Ministers,\textsuperscript{1433} set government priorities for improving the wellbeing of vulnerable children”. The Bill will create the Vulnerable Children Act, one of the two discrete pieces of legislation that will emerge from the Bill, and will implement what are described as ‘cross-agency measures’.\textsuperscript{1434} The avowed intent is to
to discharge that previous order. This will catch permanently placed children and their families where the caregivers have obtained CCOA orders for care and guardianship, notwithstanding that the reforms have a more expansive thrust. It should also be noted that many birth parents will only be able to launch a legal challenge if they are able to obtain a grant of legal aid. The reality is that the Legal Services Act 2011 places restrictions on the ability of those parents to get a grant of legal aid once legal permanency has been effected. The Commissioner has significant discretion under the Act and it is highly unlikely that this would be exercised in favour of a birth parent unless there was quite unequivocal good reason for proceedings to be contemplated and warranting a grant of aid.

\textsuperscript{1431} The Bill will result in two principal statutes, the Vulnerable Children Act and the Child Harm Prevention Orders Act and will effect significant amendment to the CYPF Act. Of the two new statutes, the Vulnerable Children Act will support the policies of the Government in addressing issues for vulnerable children, which in one significant respect will be noted in the primary text, whilst Child Harm Prevention Orders Act creates a new range of orders, the Child Harm Prevention Order, which aims to prevent specified persons from having contact with children. These are not relevant for my purpose. The Bill contains 3 separate definitions of “child”: firstly, for the purpose of Part 1, children are defined as persons under the age of 18 years and who are not married or in a civil union, and therefore consistent with the UNCROC definition but inconsistent with the definition of child in the CYPF Act and the Care of Children Act insofar as orders for day-to-day care are concerned. However, the CYPF Act definitions are used in Subpart 2 (see clause 15), while in Part 2 which concerns child protection orders, the definition of child at clause 47 is simply a person who is under the age of 18 years.

\textsuperscript{1432} I assume for present purposes that this definition will embrace children in the care of the Chief Executive or who have been in that care prior to being permanently placed in new families. The White Paper for Vulnerable Children, above n 730, defined ‘vulnerable children’ as “children who are at significant risk of harm to their wellbeing now and into the future as a consequence of the environment in which they are being raised and, in some cases, due their own complex needs. Environmental factors that influence child vulnerability include not having their basic emotional, physical, social, developmental and/or cultural needs met at home or in their wider community”, at 6. The White Paper, Volume 2, at 105, accepted that children who are the subject of intervention by CYPF “are New Zealand’s most vulnerable children”.

\textsuperscript{1433} The ‘Children’s Ministers’ are defined in clause 4 as meaning those Ministers of the Crown who either have relevant portfolio responsibilities for 1 or more of the children’s agencies (excluding any Associate Ministers) or who are designated by the Prime Minister as Children’s Ministers for the purpose of Subpart 1 of the Bill which addresses the Government priorities for vulnerable children and the vulnerable children’s plan. (The ‘children’s agencies’ are defined in clause 5 as departments of state or instruments of the Crown that are responsible for the administration of the CYPF Act, the Education Act 1989, the New Zealand Public Health and Disability Act 2000, the Policing Act 2008, the Sentencing Act 2002 and any other Acts that may be prescribed by Order in Council.

\textsuperscript{1434} As set out in Part 1 of the Bill.
improve the well-being of vulnerable children by implementation of the ‘vulnerable children’s plan’ which will be prepared by the chief executives of the ‘children’s agencies’, approved by the responsible minister and notified in the Gazette. Clause Nine requires the content of the plan to set out the steps to be taken by those chief executives to achieve the specified priorities of the Government in improving the well-being of vulnerable children. Under clause 13, once the plan is approved and in effect, the chief executives must each report jointly to the responsible Minister as to whether the goals set have been met. The intent appears to be ensuring that there is a far greater wrap-around response from the State to those children characterised as being vulnerable. The Bill, in clause 13, sets out ‘accountabilities’: this does no more than articulate that the responsible Minister is accountable to both Parliament and the Executive and that the chief executives of the children’s agencies are accountable to the responsible Minister. This has relevance to children in care as presumably the vulnerable children’s plan will, by definition, involve this category of children.

However, in the absence so far of any specified governmental policies relating to vulnerable children that will be the subject of a direction from the responsible Minister, it is difficult to predict whether this will have any particular beneficial effect for children in the care of the Chief Executive in terms of removing silos between the various responsible agencies or the better delivery of services to those children. One immediate issue that arises is that, notwithstanding the rhetoric underpinning the children’s plan in the Bill, it will not create any legal rules, any enforceable legal rights, or affect or limit the way in which a chief executive is required to exercise a statutory power of decision or affect the interpretation of any enactment or operation of any rule of law. Further, the purport of the Bill in attempting to effect greater accountability by the chief executives to vulnerable children is reduced by clause 13 being subject to clause 11(2) – as just noted - and does not limit or affect the operation of the Public Finance Act or override any “contrary other law.” Accordingly,

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1435 As prescribed by clause 8 of the Bill.
1436 This reflects the statement made in the White Paper for Vulnerable Children Vol 1, above n 730, at 4 where it is stated that “[T]he Government will focus on vulnerable children in a way that has never been done before” and that one of the ways in which this will occur is by passing “legislation and enact policies and practices so that .... the lives of vulnerable children in state care is made a priority across government departments and agencies”. The Bill singularly fails in this respect as outlined in this discussion.
1437 Clause 11(2).
1438 Specifying the accountability of both the responsible minister and the chief executives.
1439 Clause 13(2).
the impression given by this part of the Bill is that it is at best aspirational but of little practical effect.\textsuperscript{1440} The Explanatory Note to the Bill does nothing to dispel this conclusion, as the objective in question is stated, in ephemeral terms - to “reinforce the need for shared responsibility and collaborative action across the government social services sector to better protect vulnerable children\textsuperscript{1441} and to create a “durable and visible commitment to collective government action in order to improve the well-being of children”.\textsuperscript{1442, 1443}

\textit{14.3 Proposed amendments to the CYPF Act}

The Bill proposes significant amendment to the Act in respect of children who are (or will be) permanently placed, including those children who must be transitioned to independent living. It proposes a radical restructuring of concepts and frameworks to secure that child in the new placement, makes profound change to the delivery of post-permanency supports and creates an obligation on the Chief Executive to assist children aged between 15 and 20 years of age to move from care.

\textit{14.3.1 Permanent caregivers}

The Bill contains a definition of ‘permanent caregiver\textsuperscript{1444} by reference to orders made when a child is the subject of applications that would see that child moving from the Act to COCA - by the appointment of that person as a ‘guardian’ in substitution for an order under ss78, 101, 110,\textsuperscript{1445} or an extended care agreement under s140. Where this occurs that person will be appointed as either a ‘special guardian\textsuperscript{1446} or a person who has:

\textsuperscript{1440} This reinforced by the ostensible commitment set out in the White Paper for vulnerable Children, above n 730, at 12 where it is stated that the “responsibility for care and protection doesn’t rest with one agency alone. That’s why the Government has told the Chief Executives of Social Development, Health, Education, Justice, NZ Police,…, (Housing) and Te Puni Kokiri, that they will work together and be jointly accountable for achieving results for vulnerable children”.
\textsuperscript{1441} Vulnerable Children Bill, at 1.
\textsuperscript{1442} At 5.
\textsuperscript{1443} On 15 December 2013 the Government announced a new policy initiative for supporting extended family members who are caring for children who cannot be cared for by their parents. This will provide support to those family carers, often grandparents, who have taken on that task. These are not children who are the subject of proceedings under the Act. The package includes a one-off establishment grant of $350, a ‘start of year Payment’ ranging from $400 (under 5 year olds) to up to $550 for those aged over 14 years for “things like school uniforms and fees”and a discretionary Extraordinary Care Fund of up to $2000 a year for children with “significant difficulties or who are showing promise”. This funding will be available from July 2014 and applications can be made as from 13 January 2014. Beehive.govt.nz/release/significant-funding-carers-children, 15 December 2013.
\textsuperscript{1444} Clause 101 inserts this new definition.
\textsuperscript{1445} The definition refers to the CYPF Act sections as alternatives. Save for an order appointing the Chief Executive as an additional guardian, they are mutually exclusive and therefore are in the alternative. The
… care of the child … by virtue of being appointed as a guardian under section 27 of the Care of Children Act and has rights in relation to that child … under parenting orders made under section 48 of that Act.

This specific description of a guardian covers those cases where there are no issues arising for the caregivers in terms of their security of care with the child. However, there are immediate concerns with this aspect of the definition as it confuses various concepts: firstly, the appointment of a guardian under s 27 of COCA does not confer a right of care; rather it brings about ‘duties, powers, rights and responsibilities’ – the ‘incidents’ of guardianship as prescribed in ss 15 and 16 of that Act. Secondly, the reference to rights arising under parenting orders made under s 48 of COCA suggests instead the notion of guardianship and also, overlooks that a parenting order can either be in respect of day-to-day care or for contact.1447

14.3.2 Special guardianship

The more profound proposal is creating the status of a ‘special guardian” to “provide increased security for children entering ‘Home for Life’” placements.1448 This will be able to be “tailored to meet the child’s situation by allowing guardianship rights to be shared between the special guardians and the children’s parents, or vested solely in the special guardians.”1449 If an order is made, this will, it is said, provide permanency to the child within the CYPF Act framework, albeit with modification: the review provisions that otherwise operate in respect of custody and sole guardianship orders will not apply and the order may continue until the child turns 18 years. The special guardianship order is a new and stand-alone order to be made under proposed s 113A of the Act and will be made in substitution for COCA orders for day-to-day care and guardianship in specified situations. The order can be made either at the time the Court comes to first consider the plan prepared

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1446 And not a ‘special guardian’ as discussed above in relation to the Report of the Law Commission on Adoption, (above, n 562) but as will be seen different variant which may provide security for a very limited range of children and caregivers.
1447 It is unlikely but not impossible for a person to be appointed as an [additional] guardian and to then have a parenting order for contact. The concept is counter-intuitive.
1448 Vulnerable Children Bill, Explanatory Note, at 3.
1449 At 8.
by the Chief Executive following the making of a declaration, or on a specific application made for the purpose under intended s 110A of the Act and where the orders in favour of the Chief Executive have been previously discharged and substituted by orders under COCA in favour of the caregivers. The order for special guardianship must be accompanied by one appointing the permanent caregiver as either sole guardian of the child or as additional guardian.

When the order is made following the making of a declaration, the Court is to be given jurisdiction to make the order under new s 113A at the same time as appointing the person as either a sole or additional guardian. In the second instance, the application for appointment can only be made by a ‘permanent caregiver’ who is not (already) a special guardian and leave of the Court is required to make the application. That leave may only be given if the Court is satisfied, firstly, that the application is made to replace COCA orders with orders for guardianship under proposed ss 110 and s113A, and secondly, that all available mechanisms under COCA have been invoked to resolve disputes that have arisen between that permanent caregiver and any parent of guardian of the child in specified circumstances. These are firstly, that the permanent caregiver has been unable to effectively exercise guardianship or day-to-day care responsibilities under COCA, that have arisen due to the conduct of the parents or other guardians of the child and that conduct forms a pattern of behaviour and the child’s welfare is being threatened or seriously disturbed as a result, and secondly following an application under intended s 29A of COCA, the Court will

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1450 The application is to be treated as if it were an application under s 125 of the CYPF Act to vary or discharge an existing order under Part 2 of the Act. The usual procedural provisions then apply. See clause 117 and proposed s 110A(3).
1451 No application will be required where this process is followed, as occurs now. The plan which has been prepared will recommend the making of the combined orders.
1452 As defined and noted above. This can only embrace a person who has assumed COCA orders for guardianship and day-to-day care following discharge of the CYPF Act orders previously in force.
1453 The words ‘who is not a special guardian’ in the clause are redundant.
1454 For guardianship under s 27 and ‘all associated parenting orders” under s 48. This is intended to include any parenting order granting contact to the birth parent. Clause 116 makes a consequential amendment to s 107 of the CYPF Act. (This section provides that the person in whose custody the child is placed is able to determine access in the absence of an order for access made under s 121.) The section is to be amended by including a reference to s 113A in paragraph (b) of the section. The purported effect is to confirm that in the absence of either an access order under s 121 or an order appointing a special guardian under s 113A, then the custodian in law is able to determine access that the child may have.
1455 Clause 117, and proposed new s 110A(2).
simultaneously revoke the person’s appointment as guardian and any associated parenting orders under s 48 of COCA.\textsuperscript{1457}

The jurisdiction to make the order and the effect of the order are specified in clause 118 which inserts new ss 113A and 113B into the Act. The Court is able to make an order only if “the appointment is made for the purpose of providing the child with a long-term, safe, nurturing, stable, and secure environment that enhances the child’s interests where there is either no other guardian or the special guardian replaces, or is additional to, an existing guardian of the child.\textsuperscript{1460} New s 113B details the effects of an order being made. Firstly, and importantly, irrespective of whether the person is a sole or additional guardian, that person has custody of the child and no order may be made under s 101 of the Act in respect of the child and s 114(2)(b) and (c) apply to the order.\textsuperscript{1461} Secondly, the order must specify the access and other rights (not being custody or guardianship rights) of each existing guardian of the child. This will prescribe the terms and conditions pertaining to access. If the special guardian is also appointed as an additional guardian, the order for special guardianship must specify the nature and extent of the guardianship rights that are to be held exclusively by the special guardian and which are to be shared between that special guardian and the existing guardian and the special guardian.\textsuperscript{1462} The special guardian has a duty to inform existing guardians of decisions made in the exercise of exclusive guardianship rights.

Once made, the order for special guardianship is entrenched to the extent that leave to apply to vary or discharge the order is required unless the application is made by the Chief

\textsuperscript{1456} The permanent caregiver.
\textsuperscript{1457} This is set out in clause 137 which inserts will new s 29A into COCA. This provides jurisdiction to the Court (on an application) to revoke the appointment of a guardian if that person is a permanent caregiver of a child (as defined) and who is not a special guardian of the child. The application to revoke must be accompanied by application for appointment as a special guardian under new s 110A and both that order and an order for guardianship under s 110 are made. When those orders are made on that application, the Court must also discharge, under s 56 of COCA, any parenting orders for day-to-day care (in favour of the applicant) or contact (in favour of any specified person).
\textsuperscript{1458} Clause 118, new s 113A(1)(a).
\textsuperscript{1459} Which begs the question of why the order would be required as guardianship decisions could otherwise be made without issue by the new caregivers having been appointed under s 27 of COCA.
\textsuperscript{1460} An ‘existing guardian’ is defined in cl 118 (the new s 113A(2) for both s 113A and s 113B, as a person who is not a special guardian who, immediately before the order or special guardianship was made, is a guardian of the child.
\textsuperscript{1461} To remind the reader, these the order confers a right of day-to-day care for the purpose of s 92 of COCA, and secondly, the child is deemed to have been placed in the care of the recipient of the order as if that had occurred under s 101 of the Act and ss 104 – 107 apply accordingly.
\textsuperscript{1462} This is reinforced in guardianship decision making that occurs in accordance with any exclusive areas of guardianship cannot be the subject of a dispute between guardians under s 115 of the CYPF Act.
Executive, a social worker, an iwi or cultural social service or the director of a child and family social service, or, all parties consent to the granting of the application. Leave in the ordinary course is only to be granted in the event of discharge if there has been a significant change in the circumstances of the child or, in the case of variation, either the child’s situation is so changed or there has been a significant change in the circumstances of the parent or any guardian.\textsuperscript{1463}

\textit{14.3.3 Discussion special guardianship}

There are a number of issues likely to arise if the new provisions are implemented as currently drafted. Firstly, the Bill is silent as to the circumstances when, following the making of a declaration, the Court will be asked to make an order for special guardianship (and also appointing the caregivers as either sole or additional guardians as well). The clear implication must be that this power will be exercised in situations firstly, where the Chief Executive previously had been appointed as sole guardian and it is appropriate that the guardianship rights of the birth parents/other guardians remain suspended and of no effect, or be circumscribed in some other way. (Although, a conceptual issue arises here: if sole guardianship status was held, then the birth parents could not have exercised guardianship rights and could not, as a matter of law, have been obstructive during the currency of the order for sole guardianship). The second scenario could arise where the Chief Executive decided not to apply for guardianship status during the currency of the s 101 custody order or where both the Chief Executive and the birth parents had guardianship status. In either event, the birth parents would have been sufficiently unco-operative such that child-focused guardianship decisions could not be made for the child without the need to go to the Family Court for resolution of a dispute between guardians.

Secondly, the proposed s 110A(2)(b) requires the person to satisfy the Court that all available mechanisms under COCA to resolve disputes concerning guardianship have been tried, but to no avail. Ordinarily this will involve an application for a direction about a dispute between guardians under s 44 of COCA).\textsuperscript{1464} Assuming the changes wrought by the Vulnerable Children Bill were in force now (and prior to the changes to be effected by the Family Courts

\textsuperscript{1463} See clause 119 which amends s 125 of the CYPF Act.
\textsuperscript{1464} Which under the reforms to COCA will become s 46L. If 2 or more guardians are unable to agree on a matter concerning the exercise of their guardianship, anyone of them may make an application to the Court for its direction on that issue.
Proceedings Amendment Bill) then a request could be made for a mediation conference under the Family Proceedings Act.\textsuperscript{1465} Proceeding on the premise that the new provisions are in force, s 46CB provides that where there is a dispute between guardians, any application for a direction filed under s 46L must be accompanied by a family dispute resolution form as provided for in the section. The parties to the dispute must attend family dispute resolution (‘FDR’) unless the case comes within one of the specified statutory exceptions in subsection (3). These include instances where the proceedings relate to a child who is the subject of proceedings “already begun” under the CYPF Act,\textsuperscript{1466} or the application is accompanied by an affidavit which provides reasonable grounds to believe that at least one of the parties is unable to participate effectively in FDR or at least one of the parties to the family dispute or a child of one the parties has been subject to domestic violence by one of the other parties.\textsuperscript{1467} If FDR is required there is a fee for this to be paid by the permanent caregivers.\textsuperscript{1468} Should the matter proceed to Court, a judge may refer the parties to FDR or to counselling.\textsuperscript{1469}

Secondly, the applicant permanent caregivers must satisfy the Court that they have been unable to effectively exercise their guardianship responsibilities and that this is due to the

\textsuperscript{1465} When a request is made for a conference, the registrar of the Family Court must allocate one. There is no jurisdiction to refuse to do so. However, the Family Court Proceedings Reform Bill repeals all of Part 2 of the Family Proceedings Act 1980 and the mediation conference will be no more.

\textsuperscript{1466} This in reference to proceedings under Part 2 of the CYPF Act. This part embraces ss 13 - 149 inclusive and captures all proceedings relating to the care and protection of children, including the initial application for a declaration, access applications, reviews of orders, and discharge and variation applications.

\textsuperscript{1467} This provision may raise a number of problems of interpretation. Firstly, the question of whether a party is unable to effectively participate in FDR may be a matter of conjecture. The caregivers may consider that the birth parents cannot participate with the latter taking a quite different position. It is unclear whether there is any relief, other than judicial review, should an order/direction be made/issued that FDR need not take place because of the assertion made by caregivers that the birth parents are ‘impossible’. Secondly, COCA has no definition of ‘domestic violence’. However, that found in s 3 of the Domestic Violence Act 1995 is incorporated by s 5A (as inserted by clause 4 of the Family Court Proceedings Reform Bill) which requires domestic violence to be taken into account by the Court in determining welfare and best interests in determining disputes between guardians under s 46L and applications for, or variations of, parenting orders. The definition of ‘domestic violence’ would appear to cover certain of the grounds for making a declaration under s 14(1) of the CYPF Act to the extent that these involve acts of commission of physical, emotional and psychological harm to a child. However, not all of the grounds are necessarily embraced.

\textsuperscript{1468} This is $980. Ordinarily it might be expected this will be paid for by the Chief Executive, particularly if there is a services order in place requiring the Chief Executive to fund the legal costs of the caregivers. However, and as to be noted below in Chapter Fourteen, under the amendments made by the Vulnerable Children Bill, this may no longer occur.

\textsuperscript{1469} Sections 46D and 46E of COCA as amended by the Family Court Proceedings Reform Bill. There are restrictions on this occurring as provided in each of the sections with the judge considering that the referral will assist in resolution of the dispute of assisting the parties with their relationship and implementing any decision of the Court. The problem is that these provisions are not specifically directed at disputes between caregivers and birth parents.
continuing conduct of the other parents/guardians\textsuperscript{1470} and that the child’s welfare is being threatened or seriously disturbed. These requirements pose a significant hurdle to any applicant given the mandatory conjunctions between the specified limbs. They will need to show that they have in every respect attempted to meet their obligations as additional guardians to consult and make joint decisions with the other guardians and that it is the actions of those other guardians which have resulted not only in the impasse but also that the effect on the child is as prescribed. To have this effect, the issue must be a highly significant one and go directly to the heart of the child’s welfare. The fact that a birth parent/guardian has, for example, thwarted a planned holiday may not suffice, nor may a dispute over the school the child attends, or the child’s religious upbringing.

In the lead up to the introduction of the Bill, statements emanating from the Minister have been to the effect that the actions of birth parents who prevented the families of permanently placed children from getting on with their lives (and preventing those families from going on holiday was one such example) would not be tolerated. The proposed changes simply fail to reflect that political rhetoric. The preconditions for the making of an order are particularly prescriptive and will be difficult in any given instance to meet. The threshold for obtaining such an order is set at a ridiculously high ceiling, with it possibly being easier to get an order for adoption than to be made a special guardian.\textsuperscript{1471}

\textbf{14.3.4 Post permanency supports}

A most concerning provision in the Bill is the restriction on the making of services orders in cases of permanency and for the demise of all existing orders in favour of permanent caregivers.\textsuperscript{1472} The Regulatory Impact Statement on these changes observed that services orders are perceived as being the “first option” for getting support for caregivers and are “often made on a contingency basis rather than to address known needs”. The example given in the RIS was for orders being used to cover costs that a normal parent would be expected to

\textsuperscript{1470} Thus creating a pattern of behaviour which must be shown to exist.

\textsuperscript{1471} Comment by Professor Bill Atkin of Victoria University in “Random Thoughts” a paper prepared for an NZ Law Society Family Law Section working party which prepared a submission on those parts of the Vulnerable Children Bill relating to the CYPF Act.

\textsuperscript{1472} This is provided for by clause 115 which inserts s 86B into the CYPF Act. The Court cannot make either an interim or substantive order in respect of either the actual or intended permanent caregiver of a child or of the child who is to be so placed. Further, the section goes onto provide that any existing services order (whether interim or otherwise) in force on the date when the section comes into force, then the order no longer needs to be reviewed from that date (a services order is one that must be reviewed by the Family Court pursuant to ss 128 and 134 of the CYPF Act) and ceases to have effect
meet … music lessons or clothing. This means that resources do not always go to meet the most serious needs of our vulnerable children”.\textsuperscript{1473} As if to compensate for this, and the RIS noted the possibility that the judiciary unless satisfied caregivers were going to be supported, might continue to use services orders as the vehicle to deliver supports for caregivers, the Bill imposes on the Chief Executive a new duty to provide support to caregivers and permanently placed children.\textsuperscript{1474} The Regulatory Impact Statement records that the Chief Executive was required by Cabinet to provide support in situations where Home for Life caregivers need support that:\textsuperscript{1475}

- cannot be met by existing sources of government support
- is over and above what is reasonable for the caregiver to fund
- arises as a result of the child’s care and protection needs or as a result of extraordinary health, education or developmental needs.

The issue here is with the quite restrictive statutory criteria that are to apply before support will be provided.\textsuperscript{1476} The grounds upon which support may be given are both prescriptive and conjunctive. They are set out in a new subsection (2) of s 389.\textsuperscript{1477} If all are met, then the Chief Executive must provide financial assistance to the permanent caregiver of the child: firstly, the need for that assistance must arise from the care and protection needs or the \textit{extraordinary} health, education or developmental needs of the child; secondly, the financial needs are greater than it is reasonable to expect the permanent caregivers to meet; thirdly, those financial needs cannot be met by existing sources of support under the Act or

\textsuperscript{1473} Regulatory Impact Statement (‘RIS’) accompanying the Bill on this aspect, “Additional amendments to legislation to assist children in care (Family Court appeal process for home for life caregivers)”, at [10]. The RIS also acknowledged that as services orders had to be reviewed they were resource intensive for the Chief Executive. This derogated from the desire to give these children and their families a normal life. (At [11])
\textsuperscript{1474} The RIS whilst acknowledging children who are permanently placed are “New Zealand’s most vulnerable” (at paragraph 3) noted that in April 2013 Cabinet agreed to introduce the new guardianship provisions in the Bill to provide increased security to those children who have been placed. (At [8])
\textsuperscript{1475} Above n 1475, at [8].
\textsuperscript{1476} Clause 132 amends s 389 of the Act.
\textsuperscript{1477} As originally enacted, this conferred upon the Chief Executive discretion to provide financial assistance to children who had been the subjects of an agreement between the Chief Executive and caregivers under Under any of ss 139, 140 or 140 of the CYPF Act or or had been the subject of a custody, services, support or guardianship order and who “in the circumstances of the particular case, is in need of special assistance.
\textsuperscript{1478} Emphasis added.
any other enactment, and are unlikely to be provided otherwise; fourthly, it is reasonable in the circumstances for the Chief Executive to provide the financial assistance; and last, the provision of such assistance is consistent with any general or special directions given to the Chief Executive by the Minister.

It is not possible to yet fully appreciate the parameters of this new provision or its implications for permanent caregivers. However, the initial injunction, that the Chief Executive ‘must’ provide financial support is so qualified that it may be very difficult for any caregiver to obtain for that assistance. What is also now apparent is that unless a child is actually manifesting symptoms of the abuse suffered (including his or her care legacy) that support will not be provided for on a contingency basis – reflecting the prospective responsibility that is due to children and their caregivers. Further, there are some current aspects of financial support that might necessarily become unavailable in the future given the wording of the subsection. One glaring instance is the provision of financial support for caregivers should they be taken to Court by a birth parent over day-to-day care, guardianship or contact issues.\textsuperscript{1479} Where permanent caregivers have orders under COCA for day-to-day care and guardianship, they may face legal challenge or may have to make application themselves over contact or guardianship. They will have to fund that cost as the need for financial assistance does not arise from the child’s care and protection needs and thus any request for funding falls at the first hurdle.\textsuperscript{1480} A child might need therapeutic assistance to address the legacies of abuse suffered. Will this have to be framed as a request for funding to cover the provision of that intervention? Will the caregivers be directed to the public health system being an existing source of support available under “any other enactment”? What if the assistance can be provided but not in a child-focused timeframe? It would appear that assistance would not be forthcoming in such situations.

\textsuperscript{1479}This may not be an issue where the permanent caregivers have status as special guardians – and assuming that status was obtained at the time of the Family Court making post-declaration orders. In other instances, the question of cost immediately arises.

\textsuperscript{1480} A request for assistance to cover legal costs may also fail because legal aid may be available, notwithstanding its user-pays philosophy and the possibility of a charge being taken over property of the permanent caregivers or a scheme of repayment being required. This is likely to create added stress to the caregivers.
The possibility of having an adverse decision reversed is provided for by a two-tier system of review, firstly by an internal process\textsuperscript{1481} and secondly, by way of appeal to the Family Court.\textsuperscript{1482} This right of appeal is limited to the matter being wrong in law or unreasonable (or both) and arises where the permanent caregiver has not received notification of the outcome of the review within three months after it was lodged or the permanent caregiver is dissatisfied with the review. The Chief Executive is to file with the Family Court a report containing the decision that is the subject of appeal, the considerations to which regard was had in making the decision and a copy of all information that was held when the decision was made. The appeal is by way of re-hearing, and the Court will be able to substitute its views for those of the Chief Executive where findings of fact are required. The grounds of appeal will relate back to the criteria that must be satisfied to obtain assistance and, given the narrow parameters involved, successful appeals may be unlikely. What is not known is whether legal aid will be available for the internal review stage of the process or for the appeal to the Family Court.\textsuperscript{1483}

14.3.5 Supporting young people to transition from care

The Vulnerable Children Bill provides that those vulnerable children aged between 15 and 20 years of age who are in the ‘care or custody’ of the Chief Executive must receive the advice and assistance that is required to become, and remain, independent after leaving care or custody.\textsuperscript{1484} The Bill provides that this specified category of children who have been in care or custody and who ask for assistance. In this latter event, the Chief Executive must, as in his/her discretion considers necessary, provide advice and assistance to enable the person to achieve independence. Direct financial assistance may be provided in ‘exceptional circumstances’ to assist in the transition to independence and after the Chief Executive has considered what other financial assistance is available to the person.\textsuperscript{1485} At first glance, this

\begin{footnotes}
\item[1481] This internal review is established by proposed s 389A and will be in accordance with a process yet to be established by the Chief Executive.
\item[1482] As set out in s 389B. Importantly the the Court has discretion to appoint a lawyer to represent the child to whom the appeal relates. The decision of the Family Court is final. The Chief Executive must give effect to any determination made.
\item[1483] The Vulnerable Children Bill amends the Legal Services Act 2011 in one respect quite unrelated to this.
\item[1484] Clause 131 inserts s 386A into the Act. It places obligations not only on the Chief Executive but also on Iwi, Cultural, and Child and Family Social Services.
\item[1485] Where direct financial assistance is given this is by way of contribution to living expenses so the person can live near where she is employed (or looking for work) or receiving education or training to assist with education or by a grant to assist with education or training. There appears to be a drafting error in the section: subsection
\end{footnotes}
new initiative is welcome in setting out more directly the obligation of the Chief Executive to assist young people transitioning from care. However, on analysis, there are for my purposes two primary issues with it requiring further consideration.

Firstly, it requires the young person to be the initiator of the supports that may be delivered by the Chief Executive.\textsuperscript{1486} I consider that Chief Executive owes a duty of care to these young people to provide for their wellbeing and that the Chief Executive should be the initiator of the supports rather than the young person. Secondly, applies to those aged between 15 and 20 years who have, for at least three months been in the care of custody of those organisations specified in the subsection. It is unclear whether it is intended that it applies to that category of children irrespective of when they were in care for the three months.\textsuperscript{1487} Thirdly, the provision provides that the Chief Executive may, in exceptional circumstances, provide financial assistance in specified situations.\textsuperscript{1488} The use of the word ‘exceptional’ invokes a particularly high threshold that must be satisfied before financial assistance can be made available. A lesser threshold is necessary given the issues that confront these young people who are transitioning from care to independence.\textsuperscript{1489}

\textbf{14.4 Conclusion}

The proposed amendments to the Act in respect of special guardianship and post-permanency supports are profound. They are extremely restrictive in their operation and will do nothing to engender confidence in caregivers of permanently placed children that they are in reality being supported by the Government, tearing asunder the social contract. An unintended, but real, consequence will be caregivers receiving advice not to take orders under COCA and to remain under the auspice of the CYPF Act. This would be my advice to the caregivers of Shanaia.

\textsuperscript{1486} I am grateful to Sarah Ashton of the Dingwall Trust for pointing this out to me. This is made clear by new s 386A(3). If a young person makes such a request, then the agency which receives that request must refer it on to the Chief Executive.

\textsuperscript{1487} See proposed new s 386A(1). For example, if the person was in care or custody for three months at the age of 5 years, is that sufficient?

\textsuperscript{1488} See new s 386A(5).

\textsuperscript{1489} New s 386A(4)(b).
CHAPTER FIFTEEN

CONCLUSION

This thesis argues that the State has specific responsibilities to children in its care. This is a responsibility that arises from the operation of law, from the time when an order is made placing a child in the custody of the Chief Executive. It is derived from the role of the Chief Executive, in the performance of statutory duties conferred by the CYPF Act. The responsibility continues through to and beyond the discharge of the order in those instances where the child is placed with a new family or when it terminates by virtue of the child aging out of care. That responsibility is both retrospective and prospective, and embraces both legal and moral consequences that may arise in the event of there having been failure by the Chief Executive in the performance of those statutory duties.

In formulating a path to the conclusions outlined in this last chapter, I have identified a rich and complex historical legal and social tapestry that explains the role of and the responsibilities taken up by the State to children in its care. I conclude that the responsibility of the Chief Executive, having intervened to ensure the safety of the child, is then to ensure that the welfare of the child, his or her well-being, is enhanced. Given the fact of intervention and then permanent placement, I argue that a social contract exists between the State and those who care for children who have been permanently placed by the Chief Executive, which places on the Chief Executive the duty to support and secure that placement so that it is sustained and the child is able to be nurtured and cared for through to his or her attaining independent adulthood. This necessitates, where appropriate, the continued provision of support for that child and his or her new family so that the placement does not collapse.

It has been said that “[C]hildren with a history of maltreatment, and particularly those who come into care, risk being ‘doubly’ failed by family and civil society.”\(^{1491}\) It is fundamental therefore that the Chief Executive recognises this reality and, through the development and implementation of policies, ensures that both those general range of childhood issues and, those other discrete additional matters that the child in care may have, are addressed in a

\(^{1490}\) See Chapter Four and the discussion there on the nature and extent of the responsibility that exists.

\(^{1491}\) France and Tarren-Sweeney, above n 515, at 103.
timely manner.\textsuperscript{1492} If this occurs what otherwise may be significant barriers to their successfully living productive adult lives will be removed or at least in part resolved. This includes the provision of substantive supports for the child beyond the occasion of their being placed in a new family and that family obtaining COCA orders. This has regard to the considerable research that I have drawn on. This shows that children in care have poorer outcomes in terms of their development, health and education and that the risk is run at the time of their leaving care of their experiencing negative outcomes as adults, unless those issues are addressed.

This can be seen by a final discussion of the case studies. The Chief Executive is ‘responsible’ in terms of role, capacity and moral responsibility for the social work that is delivered to Shanaia and Zeppelin and to the outcomes that follow: this includes the provision of social workers with the necessary skill-set (through their having relevant professional education/training and experience) the provision of necessary therapeutic intervention to address the consequences of abuse/neglect suffered and with this being available as required given that the manifestations of abuse and neglect (including attachment disorders) may not occur until some years have elapsed, the provision of a safe home for both during their passage in care; the finding of a new placement for them which is safe and, in the case of Shanaia, one where she will be nurtured and loved as a home for the rest of her life. The responsibility will also comprise provision of an appropriate legal framework for both children. For Shanaia this will mean protecting her caregivers Braeden and Sarah from future legal challenges from Jolene and, for Zeppelin, making sure that his transition from care is managed effectively and, if necessary a PPPR Act regime put in place.

In meeting these needs the Chief Executive would have attended to the well-being of both Shanaia and Zeppelin (in the broad sense that was discussed earlier in the thesis).\textsuperscript{1493} This honours the distinction between child protection (the removal of Shanaia from the care of Jolene) and child welfare (which includes ‘well-being’ - involving the remediating of the specific care and protection and care legacies and to the extent that this requires attention

\textsuperscript{1492} And with us being reminded of the injunction in s 5(f) of the CYPF Act that decisions affecting a child should, wherever practicable, be made and implemented within a time-frame appropriate to the child’s sense of time.

\textsuperscript{1493} For example, at 28 – 30 and and 338 - 339. See also Brouwer, above n 520, at 8-9, who within the Victorian context notes that the objectives of the out of home care system have broadened beyond meeting a child’s basic accommodation, food, healthcare and schooling needs.
being paid to health, education and social capacity). If these children are to be given the best opportunity to embark on productive lives as adults in society, then this is the approach that must be adopted by the Chief Executive.

This is the other side of the responsibility that is due Shanaia and Zeppelin from the Chief Executive. Having been removed from their respective families and taken into state care, they have ‘expectations’ in respect of the performance by the Chief Executive in his role and in the exercise of statutory powers. This would embrace the paradigm that the Chief Executive as the custodial parent has done everything he could have done to ensure that the care and protection and care legacies are fully addressed to the extent possible. Having done so, then each would have been given the very best opportunity to be a functioning member of society (if permitted by their respective dual legacies) when they reach independence. This outcome is the ‘right’ that Shanaia and Zeppelin as children in care have as the final consequence of that care journey. These expectations are multi-faceted, reflecting the various discrete components of the tasks required to be done to produce the ultimate and desired outcome for Shanaia and Zeppelin. In this respect, they reflect interests that, together, are sufficient to cast a responsibility and a consequent obligation on the Chief Executive. This is not (necessarily) legally enforceable but nonetheless sufficient to impose on the Chief Executive the responsibility to account for what has taken place. How this manifests itself in a practical sense is complex, as should there be a failure in responsibility and using Shanaia as the example, if abuse in care has occurred and there has been negligence by the Chief Executive and/or agents, then obtaining a legal sanction for harm caused may be difficult. Policy considerations may militate against relief being available. Nonetheless, although legal liability may be denied, moral responsibility undoubtedly remains.

The thesis has shown that there has been an acceptance of both a resulting public good and of social capital being created when the State intervenes in families in order to protect children who have been abused or neglected and with this resulting in children either being placed in new families or in alternative care. There is, therefore, a partnership inherent in the relationship between the State and the caregivers of the permanently placed child. I have characterised this as a ‘social contract’ that has been entered into when that family takes into

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1495 George, at 28.
1496 This may end up being a pyrrhic victory at best, given the restrictions arising from policy considerations.
its care the previously abused/neglected child whom the State has removed from his birth family and placed in a new family where she will be loved and nurtured and, ultimately, be able to make her way in the world as a functioning and contributing member of society. This 'social contract' requires the State to provide real and substantive support for caregivers. Honouring and respecting the relationship is fundamental. This embraces the situation when the child is in the Chief Executive’s custody (and whether or not in the intended permanent placement) and once that placement has occurred. As it is a prospective responsibility, the duty/obligation is a continuing one. The Chief Executive will in breach of that obligation if there is a failure to ensure that policies are implemented, to the extent necessary to achieve successful outcomes for those children. The prospective nature of this responsibility also involves a moral duty arising from the fact of intervention: intervention though mandated by legislation is nonetheless part of the fabric of social practice, with “some moral duty” [being] owed towards a child [lying] on all who are capable of affecting that child by their action or inaction.\textsuperscript{1497} Society does not accept parents abusing, neglecting or abandoning their children, rather it accepts as a fundamental moral duty that the community must ensure the wellbeing of all of its children because:

… cardinal moral principles ordain the nurturing and promotion of every individual life, the community can endeavour to produce the mix of social rules which best fulfil the obligation… So whether a parent, uncle or state nurse, the individual who has assumed or been allocated a relevant responsibility has this duty already. The background moral duty is given concrete form in the case of certain individuals by reason of the social roles in which they are cast.\textsuperscript{1498}

The New Zealand experience so far suggests that that social contract is becoming somewhat frayed. This is, in part, a reflection of the political framework within which social policy is implemented. New Zealand has been in the thrall of the new-right economic paradigm since 1984. This has been discussed as one of the drivers behind the implementation of the CYPF Act and how the role of the State is perceived.\textsuperscript{1499} Thus although the Act can be seen on the


\textsuperscript{1498} This background moral duty is derived from our societal rules, mores and practices and is to be seen in conjunction with the more fundamental “\textit{a priori} duty to promote human flourishing” which has an independent existence and binds all.

\textsuperscript{1499} See chapter Seven above.
one hand as a manifestation of Fox Harding’s ‘state paternalism and child protection’ model, it nonetheless has operated within as political and policy framework that reflects the laissez-faire and patriarchy model.\textsuperscript{1500} Running alongside have been those other dynamics, departmental re-structuring, funding and resourcing concerns and having to respond to the deaths (or serious injury) of children who have been in care or have been known to the Chief Executive. The reforms both to the Family Court and the Act reflect this paradigm.\textsuperscript{1501} The quite profound amendments that are proposed by the Vulnerable Bill will see permanently placed children and their caregivers left without substantive supports given the effective abolition of the use of services orders in such instances and the very high threshold level to be achieved before support will be delivered under the intended amendment to s 389 of the Act. The overarching conceptual schematic behind the reforms is that they are ideological and cost driven, with the former providing the impetus for the latter.\textsuperscript{1502}

The responsibility owed by the Chief Executive to children placed in his care exists because the State has determined that the parents of those children have failed in their own duties owed to their children. The State is effectively saying that it can do a better job at the parenting task than those who were previously carrying it out. The State therefore is to be held accountable for assuming that parenting obligation and for its performance in carrying it out. The need for a positive care experience and a positive final care outcome arise as a necessary consequence of intervention taking place. The State is telling those parents and the child that it, the State, can do a better job at raising the child than the parents could. This is the implication behind intervention and removal – as after all, why intervene at all if the promised land is but a mirage, and my concern is that this is, if not already, likely to be the reality.

\textsuperscript{1500} Fox Harding, above n 19. See Chapter Seven.
\textsuperscript{1501} A complaint from many who opposed the current reforms to the Family Court and who presented submissions to the Justice and Law reform Select Committee was that the changes that have been made have no research base. I have a similar concern in respect of the proposed amendments to the CYPF Act in respect of supporting permanently placed children. In the forward to Bogenschneider \textit{Family Policy Matters: How Policymaking affects Families and What Professionals Can Do} (2nd ed, Lawrence Erlbaum Associates, 2006) at xiii, an American academic, Thomas J Corbett, repeated an observation of a US congressional staffer that “In Congress, policy is driven by two main factors: power and ideology. Research accounts for 5\% of the input with an upside potential of 10\%.” The comment is apt.
\textsuperscript{1502} Cooke, above n 39. (See the discussion at chapters 7 and 14.)
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The Long title

An Act to reform the law relating to children and young persons who are in need of care or protection or who offend against the law and, in particular,—

(a) To advance the wellbeing of families and the wellbeing of children and young persons as members of families, whanau, hapu, iwi, and family groups:

(b) To make provision for families, whanau, hapu, iwi, and family groups to receive assistance in caring for their children and young persons:

(c) To make provision for matters relating to children and young persons who are in need of care or protection or who have offended against the law to be resolved, wherever possible, by their own family, whanau, hapu, iwi, or family group:

2 Definitions

Residence—

(a) Means any residential centre, family home, group home, foster home, family resource centre, or other premises [or place], approved or recognised for the time being by the [chief executive] as a place of care or treatment for the purposes of this Act; and

(b) Includes any place of care or treatment, so approved, whether administered by the Crown or not.

4 Objects

The object of this Act is to promote the well-being of children, young persons, and their families and family groups by—

(a) Establishing and promoting, and assisting in the establishment and promotion, of services and facilities within the community that will advance the wellbeing of children, young persons, and their families and family groups and that are—

(i) Appropriate having regard to the needs, values, and beliefs of particular cultural and ethnic groups; and

(ii) Accessible to and understood by children and young persons and their families and family groups; and
(iii) Provided by persons and organisations sensitive to the cultural perspectives and aspirations of different racial groups in the community:

(b) Assisting parents, families, whanau, hapu, iwi, and family groups to discharge their responsibilities to prevent their children and young persons suffering harm, ill-treatment, abuse, neglect, or deprivation:

(c) Assisting children and young persons and their parents, family, whanau, hapu, iwi, and family group where the relationship between a child or young person and his or her parents, family, whanau, hapu, iwi, or family group is disrupted:

(d) Assisting children and young persons in order to prevent them from suffering harm, ill-treatment, abuse, neglect, and deprivation:

(e) Providing for the protection of children and young persons from harm, ill-treatment, abuse, neglect, and deprivation:

(f) Ensuring that where children or young persons commit offences,—
   (i) They are held accountable, and encouraged to accept responsibility, for their behaviour; and
   (ii) They are dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways:

(g) Encouraging and promoting co-operation between organisations engaged in providing services for the benefit of children and young persons and their families and family groups.

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

Subject to section 6 of this Act, 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, whanau, 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, whanau, hapu, iwi, and family group:

(b) The principle that, wherever possible, the relationship between a child or young person and his or her family, whanau, 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, whanau, 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.

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 of this Act.

7 Duties of Chief Executive

(1) It is the duty of the chief executive to take such positive and prompt action and steps as will in the chief executive's opinion best ensure—

(a) That the objects of this Act are attained; and

(b) That those objects are attained in a manner that is consistent with the principles set out in sections 5 and 6 of this Act.

(2) In carrying out the duty imposed by subsection (1) of this section, the chief executive shall—

(a) Monitor, and advise the Minister on, the effect of social policies and social issues on children, young persons, families, whanau, hapu, iwi, and family groups:

(b) Promote—

(i) The establishment of services (including social work services, family support services, and community-based services designed to advance the welfare of children and young persons in the community or the home); and

(ii) The adoption of policies (including the provision of financial support to parents, families, and family groups)—

that are designed to provide assistance to children and young persons who lack adequate parental care, or require protection from harm, or need accommodation or social or recreational activities:

(ba) In relation to child abuse,—
(i) Promote, by education and publicity, among members of the public (including children and young persons) and members of professional and occupational groups, awareness of child abuse, the unacceptability of child abuse, the ways in which child abuse may be prevented, the need to report cases of child abuse, and the ways in which child abuse may be reported; and

(ii) Develop and implement protocols for agencies (both governmental and non-governmental) and professional and occupational groups in relation to the reporting of child abuse, and monitor the effectiveness of such protocols:

(c) Ensure, wherever possible, that all policies adopted by the Department, and all services provided by the Department,—

(i) Recognise the social, economic, and cultural values of all cultural and ethnic groups; and

(ii) Have particular regard for the values, culture, and beliefs of the Maori people; and

(iii) Support the role of families, whanau, hapu, iwi, and family groups; and

(iv) Avoid the alienation of children and young persons from their family, whanau, hapu, iwi, and family group:

(d) Establish and fund Care and Protection Resource Panels:

(e) Establish procedures to ensure that the cases of children and young persons in respect of whom action has been taken under this Act are regularly reviewed in order to assess the adequacy and appropriateness of that action:

(f) Ensure that persons providing services under this Act receive adequate training and comply with appropriate standards:

(g) Monitor and assess the services provided under this Act by the Department and by other organisations, groups, and individuals.

13 Principles

Subject to sections 5 and 6 of this Act, any Court which, or person who, exercises any powers conferred by or under this Part or Part 3 or Part 3A or sections 341 to 350 of this Act shall be guided by the following principles:

(a) The principle that children and young persons must be protected from harm, their rights upheld, and their welfare promoted:

(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, whanau, hapu, iwi, and family group, and that accordingly—

(i) A child's or young person's family, whanau, 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, whanau, 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, whanau, hapu, iwi, and family group:

(e) The principle that a child or young person should be removed from his or her family, whanau, 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, whanau, 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, whanau, 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) of this Act, the principle set out in section 208(g) of this Act.

14 Definition of child or young person in need of care or protection

(1) A child or young person is in need of care or protection within the meaning of this Part of this Act if—

(a) The child or young person is being, or is likely to be, harmed (whether physically or emotionally or sexually), ill-treated, abused, or seriously deprived; or

(b) The child's or young person's development or physical or mental or emotional wellbeing is being, or is likely to be, impaired or neglected, and that impairment or neglect is, or is likely to be, serious and avoidable; or

(c) Serious differences exist between the child or young person and the parents or guardians or other persons having the care of the child or young person to such an extent that the physical or mental or emotional wellbeing of the child or young person is being seriously impaired; or

(d) The child or young person has behaved, or is behaving, in a manner that—

   (i) Is, or is likely to be, harmful to the physical or mental or emotional wellbeing of the child or young person or to others; and

   (ii) The child's or young person's parents or guardians, or the persons having the care of the child or young person, are unable or unwilling to control; or

(e) In the case of a child of or over the age of 10 years and under 14 years, the child has committed an offence or offences the number, nature, or magnitude of which is such as to give serious concern for the wellbeing of the child; or

(f) The parents or guardians or other persons having the care of the child or young person are unwilling or unable to care for the child or young person; or

(g) The parents or guardians or other persons having the care of the child or young person have abandoned the child or young person; or

(h) Serious differences exist between a parent, guardian, or other person having the care of the child or young person and any other parent, guardian, or other person having the care of the child or young person to such an extent that the physical or mental or emotional wellbeing of the child or young person is being seriously impaired; or

(i) The ability of the child or young person to form a significant psychological attachment to the person or persons having the care of the child or young person is being, or is likely to be, seriously impaired because of the number of occasions on which the child or young person has been in the care or charge of a person (not being a person specified in
subsection (2) of this section) for the purposes of maintaining the child or young person apart from the child's or young person's parents or guardians.

67 Grounds for declaration that child or young person is in need of care or protection

A Court may, on application, where it is satisfied on any of the grounds specified in section 14(1) of this Act that a child or young person is in need of care or protection, make a declaration that the child or young person is in need of care or protection.

78 Custody of child or young person pending determination of proceedings

(1) In any proceedings in a Court under Part 2 of this Act in relation to a child or young person, the Court may, on the application of any party to the proceedings, or a barrister or solicitor representing the child or young person, or of its own motion, make an order relating to the custody of the child or young person pending the determination of the proceedings.

(2) Without limiting the generality of subsection (1) of this section, the Court may make an order under that subsection in relation to a child or young person in the following cases:

(a) Where the child or young person has been placed in the custody of the chief executive pursuant to section 39 or section 40 or section 42 of this Act and is brought before the Court pursuant to section 45 of this Act:

(b) Where the Court is satisfied that the child or young person is in need of care or protection for the period of the order:

(c) In the case of an application for a declaration under section 67 of this Act on the ground specified in section 14(1)(e) of this Act, where—

(i) It is not possible to make suitable alternative arrangements for the custody of the child pending the determination of the application; or

(ii) It is in the public interest that the child be held in custody pending the determination of the application:

(d) Where the Court has made a declaration under section 67 of this Act and has adjourned the proceedings pending their disposition:

(e) Where an application for a variation or discharge of any order (or the variation or discharge of any condition of any order) is made to the Court under section 125 of this Act, at any time before such application is finally disposed of:

(f) Where a report is furnished to the Court pursuant to section 135 of this Act, at any time before the Court has completed its consideration of the report and accompanying revised plan under section 137 of this Act.

(3) An order under subsection (1) of this section may be made on such terms and conditions as the Court thinks fit.
79 Persons who may be granted custody under section 78

(1) An order made under section 78 of this Act may place a child or young person in the custody of any of the following persons:

(a) The chief executive;

(b) An Iwi Social Service;

(c) A Cultural Social Service;

(d) The Director of a Child and Family Support Service;

(e) Any other person.

(2) The Court shall not make an order under section 78 of this Act placing any child or young person in the custody of any person (other than the chief executive) unless that person consents to the making of the order.

80 Effect of order made under section 78

Section 104, section 105 (other than paragraph (a), paragraph (b)(i), and paragraph (c) of subsection (1) of that section), section 106, and section 107 of this Act, so far as applicable and with all necessary modifications, shall apply with respect to every order made under section 78 of this Act as if it were an order made under section 101 of this Act.

86 Services orders

(1) Where the Court makes a declaration under section 67 of this Act in relation to a child or young person, it may—

(a) Make an order directing the chief executive or any other person or organisation named in the order to provide such services and assistance as may be specified in the order for such period and on such terms and conditions as may be specified to a parent or guardian or other person having the care of the child or young person:

(b) Make an order directing the chief executive or any other person or organisation named in the order to provide such services and assistance as may be specified in the order for such period and on such terms and conditions as may be specified to the child or young person.

(2) The Court shall not make an order under subsection (1) of this section unless the chief executive (where the order is to be directed to the chief executive) or the person or organisation that would be required to provide services and assistance pursuant to the order (in any other case)—

(a) Is given notice of the Court's intention to consider making the order; and

(b) Is given an opportunity to appear and be heard by the Court before the order is made; and
Subject to subsection (3) of this section, consents to the making of the order.

An order directing the chief executive to provide services and assistance may be made under this section without the consent of the chief executive, but only if the Court, after having regard to any reasons advanced on behalf of the chief executive as to why the order should not be made, is satisfied—

(a) That requiring the chief executive to provide those services and assistance is not clearly impracticable; and

(b) That the child or young person in respect of whom the Court proposes to make an order under this section is in the care of a person or organisation clearly consistently with the principles set out in sections 5, 6, and 13 of this Act.

101 Custody orders

Where the Court makes a declaration under section 67 of this Act in relation to a child or young person, it may make an order placing that child or young person in the custody of any of the following persons for such period as may be specified in the order:

(a) The chief executive:

(b) An Iwi Social Service:

(c) A Cultural Social Service:

(d) The Director of a Child and Family Support Service:

(e) Any other person.

Any such order may be made on such terms and conditions as the Court thinks fit.

The Court shall not make an order under subsection (1) of this section placing any child or young person in the custody of any person (other than the chief executive) unless that person consents to the making of the order.

102 Interim custody orders

Where the Court makes a declaration under section 67 of this Act, it may, instead of making a final order under section 101 of this Act, make an interim custody order under that section.

No interim custody order made pursuant to this section shall continue in force for more than 6 months after the date on which it is made.

Where an interim custody order is made pursuant to this section, the Court may, on application by any person who was the applicant in the proceedings in which the order was made, or any person on whom the application in those proceedings was served in accordance with section 152 of this Act, or the person in whose custody the child or young person was placed,—

(a) Make one but only one further interim custody order under section 101 of this Act; or
(b) Make a final order under that section; or

(c) Make such other order referred to in section 83(1) or section 84(1) of this Act as the Court thinks fit; or

(d) Dismiss the application.

104 Effect of custody order

(1) Where the Court makes an order under section 101 of this Act placing a child or young person in the custody of any person,—

(a) that person has the role of providing day-to-day care for the child or young person as if a parenting order had been made under section 48(1) of the Care of Children Act 2004 giving that person the role of providing day-to-day care for the child or young person; and

(b) Except to the extent that they are preserved by the Court in any order made under section 121 of this Act, all the rights, powers, and duties of every other person having custody of the child or young person shall be suspended and shall have no effect; and

(c) for the purposes of section 92 of the Care of Children Act 2004,—

(i) the order constitutes an order about the role of providing day-to-day care for the child or young person; and

(ii) the person in whose custody the child or young person is placed is a person who, under the order, has the role of providing day-to-day care for the child or young person.

(2) Any custody order shall be sufficient authority for any constable or any Social Worker or any other person authorised in that behalf by the chief executive to place the child or young person to whom the order relates—

(a) Where the order places the child or young person in the custody of the chief executive, with such person, or in such residence, as the principal manager of the Department for the area in which the Court is situated may direct:

(b) Where the order places the child or young person in the custody of an Iwi Social Service or a Cultural Social Service, with such person as the Convener of the Social Service directs:

(c) Where the order places the child or young person in the custody of the Director of a Child and Family Support Service, with such person or in such residence as that Director directs:

(d) Where the order places the child or young person in the custody of any other person, with that person.

(3) Any person authorised by subsection (2) of this section to place any child or young person with any person or in any residence—
(a) May use such force as is reasonably necessary for that purpose:

(b) May exercise that authority from time to time in order to return the child or young person to that person or residence:

(c) May, for the purpose of exercising that authority, exercise the powers conferred by section 105(2) of this Act, and the provisions of subsections (2) and (3) of section 105 of this Act shall apply accordingly with all necessary modifications.

105 Living arrangements for child or young person placed in custody of Chief Executive

(1) Where the Court makes an order under section 101 of this Act placing a child or young person in the custody of the chief executive,—

(a) The chief executive may transfer the child or young person from one residence under this Act to any other residence under this Act:

(b) Any Social Worker, acting with the specific or general authority of the chief executive, may arrange for the child or young person—

(i) To be placed in any residence:

(ii) To be placed in any school or other institution that provides care or training or physical or mental health care:

(iii) To undertake employment or any training for employment:

(c) Any Social Worker, acting with the specific or general authority of the chief executive, may arrange for the child or young person to live temporarily with the parents or guardians or other person previously having the care of the child or young person or with any other person, on such terms and conditions as the Social Worker may specify:

(d) Any Social Worker, acting with the specific or general authority of the chief executive, may at any time cancel any arrangement made under paragraph (b) or paragraph (c) of this subsection and, after any such cancellation, may remove the child or young person to a residence or to such other place as the Social Worker may decide, using such force as is reasonably necessary for that purpose.

(2) For the purpose of removing any child or young person pursuant to subsection (1)(d) of this section, a Social Worker may enter and search any dwellinghouse, building, aircraft, ship, carriage, vehicle, premises, or place, with or without assistance and by force if necessary.

(3) The Social Worker exercising any powers under subsection (2) of this section shall, on first entering any dwellinghouse, building, aircraft, ship, carriage, vehicle, premises, or place, and, if requested, at any subsequent time—

(a) Produce evidence of identity; and

(b) Disclose that those powers are being exercised under subsection (2) of this section.
107 Person in whose custody child or young person is placed may determine access rights in absence of Court order

Where—

(a) The Court makes an order under section 101 of this Act placing a child or young person in the custody of any person; and

(b) The Court has not made an order under section 121 of this Act granting any person access to the child or young person,—

the person in whose custody the child or young person is placed shall, subject to any order of any Court, have the sole authority to decide whether, and on what terms and conditions (if any), any person is to have access to the child or young person.

108 When custody order shall cease to have effect

Where the Court makes an order under section 101 of this Act placing a child or young person in the custody of any person, that order shall cease to have effect when—

(a) The order expires in accordance with section 102 of this Act; or

(b) The terms of the order expire; or

(c) In the case of a young person, that young person attains the age of 17 years; or

(d) In the case of a young person, that young person marries or enters into a civil union; or

(e) The child or young person is adopted by any person other than a parent of the child or young person—

whichever first occurs.

110 Guardianship orders

(1) Where the Court makes a declaration under section 67 of this Act in relation to any child or young person, it may make an order appointing any of the following persons to be a guardian of the child or young person:

(a) The chief executive:

(b) An Iwi Social Service:

(c) A Cultural Social Service:

(d) The Director of a Child and Family Support Service:

(e) Any other person.

(2) Subject to subsection (3) of this section, where the Court makes an order under subsection (1)
of this section appointing any person to be a guardian of a child or young person, the Court shall appoint that person to be—

(a) The sole guardian of the child or young person; or

(b) A guardian of the child or young person in addition to any other guardian.

(3) The Court shall not make an order under subsection (1) of this section appointing the Director of a Child and Family Support Service as the sole guardian of a child or young person.

112 Chief Executive may be appointed as guardian for specific purpose

Any order under section 110 of this Act appointing the chief executive as a guardian may specify that the appointment is for a particular purpose only.

114 Effect of guardianship order

(1) Where the Court makes an order under section 110 of this Act appointing any person as a guardian of any child or young person (whether as sole guardian or as a guardian in addition to any other person),—

(a) That person shall be a guardian of that child or young person as if that person had been appointed under section 27 of the Care of Children Act 2004; and

[(b) If the child or young person is, at the time of the making of the order, under the guardianship of the Court under an order made under the Care of Children Act 2004, that guardianship is suspended during the time when the person appointed under section 110 is the guardian (subject to section 117(2)).]

(2) Where the Court makes an order under section 110 of this Act appointing any person as the sole guardian of any child or young person,—

(a) Except to the extent that they are preserved by any other order made under this Act, all of the rights, powers and duties of every other person who is the guardian of that child or young person, or who may become a guardian during the time when the person appointed under that section is the guardian, shall be suspended and shall have no effect; and

(b) for the purposes of section 92 of the Care of Children Act 2004,—

(i) the order constitutes an order about the role of providing day-to-day care for the child or young person; and

(ii) the person in whose custody the child or young person is placed is a person who, under the order, has the role of providing day-to-day care for the child or young person; and

(c) Subject to any custody order made by the Court under section 101 of this Act, the child or young person shall be deemed to have been placed in the custody of that person pursuant to that section, and the provisions of sections 104 to 107 of this Act, so far as
applicable and with all necessary modifications, shall apply accordingly.

115 Disputes between guardians

Where—

(a) Pursuant to section 110 of this Act, any person is appointed as guardian of a child or young person in addition to any other guardian; and

(b) Those guardians are unable to agree on any matter concerning the exercise of their guardianship,—

any of those guardians may apply to the Court for its direction, and the Court may make such order relating to the matter as it thinks fit.

117 When guardianship orders to cease to have effect

(1) Every guardianship order made under section 110 of this Act shall cease to have effect when—

(a) The young person to whom it relates attains the age of 20 years or sooner marries or enters into a civil union; or

(b) The child or young person to whom it relates is adopted by any person other than its parents—

whichever occurs first.

(2) A guardianship order made under section 110 ceases to have effect if, after it is made, a court having jurisdiction under section 31 of the Care of Children Act 2004—

(a) Orders that the child or young person to whom the order relates be placed under the guardianship of the Court under that Act; or

(b) Orders that the child or young person must continue to be under the guardianship of the Court, if the child or young person was under the guardianship of the Court at the time of the making of the order under section 110.

(3) Subsection (2) does not apply if the Court making an order under that subsection orders that a guardianship order under section 110 continues in force.

134 Court to set date for review of plan

(1) Where a plan is prepared pursuant to section 128 of this Act in respect of any child or young person, the Court shall, on making any of the orders referred to in subsection (2) of that section in respect of that child or young person, fix a date by which a review of that plan is to be carried out.

(2) The date fixed pursuant to subsection (1) of this section on the making of an order shall be,—
(a) Where the order is made in respect of a child... under the age of 7 years, not later than 6 months from the date of the making of the order:

(b) In any other case, not later than 12 months from the date of the making of the order.

(3) The Court shall not fix a date pursuant to subsection (1) of this section that is later than the date on which any order made, or proposed to be made, pursuant to this Part of this Act in respect of the child or young person is to expire.

(4) On fixing a date pursuant to subsection (1) of this section, the Court may also direct who is to review the plan pursuant to section 135 of this Act. If the Court does not make such a direction, the person who prepared the plan shall be deemed to have been directed pursuant to this subsection to review the plan.

(5) The Court may at any time, on the application of any party to the proceedings, or a barrister or solicitor representing the child or young person, or of its own motion, amend any direction made or deemed to have been made under subsection (4) of this section, or revoke any such direction and substitute another direction.
Appendix Two sets out relevant sections of COCA that have been referred to in the text of the thesis.

4 Child's welfare and best interests to be paramount

(1) The welfare and best interests of the child must be the first and paramount consideration—

(a) in the administration and application of this Act, for example, in proceedings under this Act; and

(b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.

(2) The welfare and best interests of the particular child in his or her particular circumstances must be considered.

(3) A parent's conduct may be considered only to the extent (if any) that it is relevant to the child's welfare and best interests.

(4) For the purposes of this section, and regardless of a child's age, it must not be presumed that placing the child in the day-to-day care of a particular person will, because of that person's sex, best serve the welfare and best interests of the child.

(5) In determining what best serves the child's welfare and best interests, a Court or a person must take into account—

(a) the principle that decisions affecting the child should be made and implemented within a time frame that is appropriate to the child's sense of time; and

(b) any of the principles specified in section 5 that are relevant to the welfare and best interests of the particular child in his or her particular circumstances.

(6) Subsection (5) does not limit section 6 (child's views) or prevent the Court or person from taking into account other matters relevant to the child's welfare and best interests.

(7) This section does not limit section 83 or subpart 4 of Part 2.

5 Principles relevant to child's welfare and best interests

The principles referred to in section 4(5)(b) are as follows:

(a) the child's parents and guardians should have the primary responsibility, and should be encouraged to agree to their own arrangements, for the child's care, development, and upbringing:
(b) there should be continuity in arrangements for the child's care, development, and upbringing, and the child's relationships with his or her family, family group, whanau, hapu, or iwi, should be stable and ongoing (in particular, the child should have continuing relationships with both of his or her parents):

(c) the child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation among and between the child's parents and guardians and all persons exercising the role of providing day-to-day care for, or entitled to have contact with, the child:

(d) relationships between the child and members of his or her family, family group, whanau, hapu, or iwi should be preserved and strengthened, and those members should be encouraged to participate in the child's care, development, and upbringing:

(e) the child's safety must be protected and, in particular, he or she must be protected from all forms of violence [as defined in section 3(2)to(5) of the Domestic Violence Act 1995] (whether by members of his or her family, family group, whanau, hapu, or iwi, or by other persons):

(f) the child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

6 Child's views

(1) This subsection applies to proceedings involving—

(a) the guardianship of, or the role of providing day-to-day care for, or contact with, a child; or

(b) the administration of property belonging to, or held in trust for, a child; or

(c) the application of the income of property of that kind.

(2) In proceedings to which subsection (1) applies,—

(a) a child must be given reasonable opportunities to express views on matters affecting the child; and

(b) any views the child expresses (either directly or through a representative) must be taken into account.

15 Guardianship defined

For the purposes of this Act, guardianship of a child means having (and therefore a guardian of the child has), in relation to the child,—

(a) all duties, powers, rights, and responsibilities that a parent of the child has in relation to the upbringing of the child:
(b) every duty, power, right, and responsibility that is vested in the guardian of a child by any enactment:

(c) every duty, power, right, and responsibility that, immediately before the commencement, on 1 January 1970, of the Guardianship Act 1968, was vested in a sole guardian of a child by an enactment or rule of law.

16 Exercise of guardianship

(1) The duties, powers, rights, and responsibilities of a guardian of a child include (without limitation) the guardian's—

(a) having the role of providing day-to-day care for the child (however, under section 26(5), no testamentary guardian of a child has that role just because of an appointment under section 26); and

(b) contributing to the child's intellectual, emotional, physical, social, cultural, and other personal development; and

(c) determining for or with the child, or helping the child to determine, questions about important matters affecting the child.

(2) Important matters affecting the child include (without limitation)-

(a) the child's name (and any changes to it); and

(b) changes to the child's place of residence (including, without limitation, changes of that kind arising from travel by the child) that may affect the child's relationship with his or her parents and guardians; and

(c) medical treatment for the child (if that medical treatment is not routine in nature); and

(d) where, and how, the child is to be educated; and

(e) the child's culture, language, and religious denomination and practice.

(3) A guardian of a child may exercise (or continue to exercise) the duties, powers, rights, and responsibilities of a guardian in relation to the child, whether or not the child lives with the guardian, unless a Court order provides otherwise.

(4) Court order means a Court order made under any enactment; and includes, without limitation, a Court order that is made under this Act and embodies some or all of the terms of an agreement to which section 40(2) or section 41(2) applies.

(5) However, in exercising (or continuing to exercise) the duties, powers, rights, and responsibilities of a guardian in relation to a child, a guardian of the child must act jointly (in particular, by consulting wherever practicable with the aim of securing agreement) with any other guardians of the child.

(6) Subsection (5) does not apply to the exclusive responsibility for the child's day-to-day living arrangements of a guardian exercising the role of providing day-to-day care.
29 Court may remove guardians

(1) On an application for the purpose by an eligible person, the Court may make—
   (a) an order depriving a parent of the guardianship of his or her child; or
   (b) an order removing from office a testamentary guardian or Court-appointed guardian; or
   (c) an order revoking an appointment of an additional guardian made under section 23.

(2) In this section, eligible person, in relation to a child, means any of the following persons:
   (a) a parent of the child:
   (b) a guardian of the child:
   (c) a grandparent or an aunt or an uncle of the child:
   (d) a sibling (including a half-sibling) of the child:
   (e) a spouse or partner of a parent of the child:
   (f) any other person granted leave to apply by the Court.

(3) An order under subsection (1)(a) (that is, an order depriving a parent of the guardianship of his or her child) must not be made unless the Court is satisfied—
   (a) that the parent is unwilling to perform or exercise the duties, powers, rights, and responsibilities of a guardian, or that the parent is for some grave reason unfit to be a guardian of the child; and
   (b) that the order will serve the welfare and best interests of the child.

(4) An order under subsection (1)(b) or (c) must not be made unless the Court is satisfied that the order will serve the welfare and best interests of the child.

(5) On making an order under subsection (1), the Court may also make on its own initiative an order under section 27.

48 Parenting orders

(1) On an application made to it for the purpose by an eligible person, the Court may make a parenting order determining the time or times when specified persons have the role of providing day-to-day care for, or may have contact with, the child.

(2) A parenting order determining that a person has the role of providing day-to-day care for the child may specify that the person has that role—
   (a) at all times or at specified times; and
   (b) either alone or jointly with 1 or more other persons.
(3) A parenting order determining that a person may have contact with the child may specify any of the following:

(a) the nature of that contact (for example, whether it is direct (that is, face to face) contact or some form of indirect contact (for example, contact by way of letters, telephone calls, or email)):

(b) the duration and timing of that contact:

(c) any arrangements that are necessary or desirable to facilitate that contact.

(4) A parenting order may be a final order or it may be an interim order that has effect until a specified date or event or until the Court orders otherwise.
APPENDIX THREE

Appendix three sets out relevant clauses of the Vulnerable Children Bill that have been referred to in the text of the thesis.

Clause 115    New section 86B inserted (No services orders in respect of permanent caregivers)

After section 86A, insert:

“No services orders in respect of permanent caregivers

“(1) Despite sections 86 and 86A, a court must not make a services order or an interim services order under either of those sections in respect of—

“(a) a person who is, or is to be made, a permanent caregiver of a child or young person; or

“(b) a child or young person who is, or is to be, in the care of a permanent caregiver.

“(2) If a services order or an interim services order in respect of a permanent caregiver, or in respect of a child or young person in the care of a permanent caregiver, is in force on the date on which this section comes into force,—

“(a) on and from that date, sections 134 to 137 have no effect so far as they relate to the order; and

“(b) the order ceases to have effect on the date on which it is next due for review.”

Clause 118    New sections 113A and 113B inserted

After section 113, insert:

“Special guardianship orders

“(1) The court may make an order under this section appointing a person referred to in section 110(4) as a special guardian of a child or young person only if—

“(a) the appointment is made for the purpose of providing the child or young person with a long-term, safe, nurturing, stable, and secure environment that enhances his or her interests; and

“(b) either—

“(i) the child or young person has no other guardian; or

“(ii) the special guardian either replaces, or is additional to, an existing guardian of the child or young person.”
“(2) For the purposes of this section and section 113B, existing guardian means a person (other than a special guardian) who, immediately before the special guardianship order was made in respect of a child or young person, is a guardian of the child or young person.

“113B Effect of special guardianship order

“(1) Where a special guardianship order is made in respect of a child or young person, then, whether the special guardian is a sole or additional guardian and despite anything in this section,—

“(a) the special guardian has custody of the child or young person, and—

“(i) no order under section 101 may be made in respect of the child or young person; but

“(ii) section 114(2)(b) and (c) applies as if the special guardian were a sole guardian; and

“(b) the order must specify the access and other rights (not being custody or guardianship rights), including any terms and conditions that apply to those rights, of each existing guardian in relation to the child or young person.

“(2) Where a special guardianship order specifies the access and other rights of any existing guardian,—

“(a) no existing guardian may apply for an order under section 121(2)(c) or (d) concerning his or her access or other rights in relation to the child or young person, but any other parent or person may apply for orders under that section in relation to the child or young person, as if the special guardian were a sole guardian; and

“(b) section 122 applies to any access rights specified in the order as if those access rights had been granted by an order made under section 121.

“(3) If a person who is appointed as the sole guardian of a child or young person is also appointed as a special guardian, the provisions of this Act relating to sole guardians apply, except that—

“(a) sections 134 and 135 (about reviewing plans) do not apply to the court plan that was prepared for the purposes of section 128; and

“(b) despite section 117(1)(a), the order ceases to have effect when the child or young person attains the age of 18 years or sooner marries or enters into a civil union.

“(4) If a person who is appointed as an additional guardian of a child or young person is also appointed as a special guardian,—

“(a) the order must set out which guardianship rights (which may include those set out in section 16(2) of the Care of Children Act 2004) are to be held exclusively by the special guardian and which are to be shared between the existing guardian and the
special guardian; and

“(b) the order must require that the existing guardian is informed of any decisions made by the special guardian in the exercise of any guardianship rights held exclusively by the special guardian; and

“(c) the provisions of this Act relating to additional guardians apply, except as follows:

“(i) no existing guardian may apply under section 115 in respect of any guardianship rights held exclusively by the special guardian; and

“(ii) sections 134 and 135 (about reviewing plans) do not apply to the court plan that was prepared for the purposes of section 128; and

“(iii) despite section 117(1)(a), the order ceases to have effect when the child or young person attains the age of 18 years or sooner marries or enters into a civil union.

“(5) Every special guardianship order must require that, if the child or young person to whom the order applies begins to live with anyone other than the special guardian on more than a temporary basis, the special guardian must,—

“(a) if the child or young person, immediately before the guardianship order was made, was in the custody of the chief executive or a natural person, advise a social worker; or

“(b) if the child or young person, immediately before the guardianship order was made, was in the custody of an iwi social service, cultural social service, or the director of a child and family support service, advise that service or director, as appropriate.

“(6) The obligation on the chief executive imposed by section 7(2)(e) does not apply in respect of a child or young person in respect of whom a special guardianship order is made.

“(7) If a child or young person has more than 1 existing guardian, or more than 1 special guardian, this section and any other applicable sections must be applied with all necessary modifications to each existing guardian and each special guardian.”

Clause 131  New section 386A and cross-heading inserted

After section 386, insert:

“Transition from care to independence

386A Advice and assistance for people moving from care to independence

“(1) This section applies to a person aged between 15 and 20 years who has, for at least 3 months, been in the care or custody of the chief executive, an iwi social service, a cultural social service, or the director of a child and family support service, pursuant to any agreement or order specified in section 361(1)(a), (c), or (d).
“(2) If a person to whom this section applies is in the care or custody of the chief executive, an iwi social service, a cultural social service, or the director of a child and family support service, the person or organisation who has the care or custody of the person must—

“(a) consider what advice and assistance the person will need to become and remain independent after he or she leaves care or custody; and

“(b) provide, or arrange for the provision of, that advice and assistance to the person, to the extent that it reasonably relates to the period before the person leaves care or custody.

“(3) If a person to whom this section applies requests advice or assistance after he or she leaves the care or custody of an iwi social service, a cultural social service, or the director of a child and family support service, the agency that receives the request must refer the request to the chief executive.

“(4) On receiving a request for advice or assistance from a person to whom this section applies who has left the care or custody referred to in subsection (1), the chief executive—

“(a) must provide, or arrange for, the provision of such advice and assistance (not being direct financial assistance) as the chief executive in his or her discretion considers necessary to enable the person to achieve independence; and

“(b) may, in exceptional circumstances, provide financial assistance of the sort described in subsection (5), but only if—

“(i) the assistance is necessary to enable the person to transition from care to independence; and

“(ii) the chief executive has considered what other financial assistance is available to the person.

“(5) Without limiting subsection (4)(a), the advice and assistance provided may include any of the following:

“(a) giving information:

“(b) assisting the person to obtain accommodation, enrol in education or training, or obtain employment:

“(c) legal advice:

“(d) counselling.

“(6) The chief executive may provide the following kinds of financial assistance under subsection (4)(b):

“(a) contributing to the expenses incurred by the person in living near the place where he or she is or will be—

“(i) employed or seeking employment; or
“(ii) receiving education or training:

“(b) making a grant to assist the person to meet expenses connected with his or her education or training.

“(7) If the chief executive is providing financial assistance to a person that includes making a contribution or grant with respect to a course of education or training, the chief executive may—

“(a) continue to do so even though the person reaches the age of 20 years before completing the course; and

“(b) disregard any interruption in the person's attendance at the course if the person resumes it as soon as practicable.”

Clause 132  Section 389 amended (Financial and other assistance in other cases)

In section 389, insert as subsections (2), (3), and (4):

“(2) Despite subsection (1), the chief executive must provide financial assistance under this section to a permanent caregiver of a child or young person if—

“(a) the need for financial assistance arises from the care and protection needs or the extraordinary health, education, or developmental needs of the child or young person; and

“(b) the financial needs are greater than it is reasonable to expect the permanent caregiver to meet; and

“(c) the financial needs cannot be met by existing sources of support under this Act or any other enactment, and are unlikely to be provided otherwise; and

“(d) it is reasonable in the circumstances for the chief executive to provide the financial assistance; and

“(e) the provision of financial assistance is consistent with any general or special directions (not inconsistent with this section) given to the chief executive in writing by the Minister.

“(3) A direction given for the purpose of subsection (2)(e) (other than a direction of that kind that relates exclusively to an individual) must be published in the Gazette.

“(4) A direction referred to in subsection (3) is a disallowable instrument for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives under section 41 of that Act.”
APPENDIX FOUR

Appendix five sets out principles relating to parenting as set out in the judgment of Fisher J D v W (1995) 13 FRNZ 336 at 349 (HC). This judgement is referred to in chapter 6, at 6.14.

“Custody and access principles

For the legal and behavioural principles relevant to custody and access cases counsel helpfully reviewed the Guardianship Act, the authorities, the principles outlined in Butterworth's Family Law in New Zealand (6th ed), and the expert evidence given in this case. They can be summarised as follows.

(a) Welfare of the child. For all practical purposes, the only relevant consideration is the welfare of the child (s 23(1)). There is an understandable tendency of separated parents to be distracted by personal grievances and hostilities but these are of no moment except to the extent that they bear upon the interests of the child.

(b) Love and security. A child's greatest non-physical need is for love and security. Parental love requires an unconditional and irrational commitment to the child. Bonding grows out of an interaction with the child but the strongest bond is not necessarily with the person who has spent the most time caring for the child. It is the quality and intensity of the interaction that matters most. Disruption to the child's existing world is to be avoided if possible. As a child's primary attachment can alternate between parents at different stages of development the strength of existing bonds is not necessarily decisive. A male caregiver is capable of developing the same kind and strength of bond with a child as a mother. Security is promoted by stable family relationships, consistent and dependable attitudes and behaviour, and familiar surroundings and a known routine. All else being equal, disruption to the status quo should be avoided but of course competing considerations may outweigh this.

(c) Opportunity for personal growth. Also of major importance is the opportunity for personal growth, this calling for stimulating experiences, praise, recognition, responsibility, and appropriate role models. New experiences are essential for the growth of intelligence. Praise and recognition are necessary to encourage emotional, social, and intellectual learning. Children must be given responsibility if they are to develop as independent and mature individuals. They will benefit from models provided by the principal adults in their lives. Identification is more likely to occur with people who have a loving relationship with the child.

(d) Wider family and connections. Although the primary focus lies upon the immediate parent, in assessing the home which each parent can provide, the whole family and its wider context should be assessed. This requires consideration of the parent's new partner, the other children in the home, associated relatives, friends and family connections, and support systems available to the parent. Of particular importance is the
positive or negative influence of a parent's new partner, particularly if likely to occupy a quasi-parental position.

(c) Wishes of the child. The wishes of the child must be ascertained and taken into account to the extent which may be appropriate having regard to the child's age and maturity (s 23(2)). But not all expressed views have equal validity. Of special importance are external influences — conscious or otherwise — which might have distorted the child's actual or professed outlook.

(f) Damage containment. The most critical factor influencing readjustment following separation is a stable loving relationship with both parents. It follows that wherever possible there should be a strong continuing relationship with the non-custodial parent, consultation and cooperation between the parents over the child's future, and a separating out of the children's needs from the parents' own grievances and emotional needs arising from the breakdown. Communication to the children of continuing ill will between the parties should be avoided, as should engaging the children as allies in interparental disputes.

(g) Other considerations. The list of other considerations bearing upon the welfare of the children could never be closed but they include physical care, material comfort, intellectual stimulation, educational opportunity and moral guidance.

(h) Broad and personalised view. All of the foregoing considerations must be taken into account and no one factor should be treated as decisive. The approach must be personalised to each individual child and family without rigid preconceptions as to what will best suit every child.

It follows that in cases where a choice must be made between competing custodial parents, a checklist of possible considerations will usually include the following:

(a) Strength of existing and future bonding;

(b) Parenting attitudes and abilities;

(c) Availability for, and commitment to, quality time with the child;

(d) Support for continued relationship with the other spouse;

(e) Security and stability of home environment;

(f) Availability and suitability of role models;

(g) Positive or negative effects of wider family;

(h) Provision for physical care and help;

(i) Material welfare;
(j) Stimulation and new experiences;

(k) Educational opportunity; and

(l) Wishes of the child.
APPENDIX FIVE

Appendix four sets out that part of the 2006 permanency policy relating to post-permanency supports that could be available to caregivers of permanently placed children. This was contained in a document entitled the ‘User Guide’.

The ‘User Guide’ contained draft orders that can be used within a services order. The intent was to enable assistance to be targeted and directed to the specific child, although it was seemingly general in its application.

The guide under the heading “permanency and meeting the needs of children and young people – a guide to support – Purpose and Intent” stated that a consistent approach is sought which:

(a) intends to recognise the distinct individual circumstances of each child so as to “ensure that their reasonable individual needs are met”;

(b) MSD commitment to ongoing support is to occur within a legal framework;

(c) Every effort must be made to as well to ensure that MSD involvement is “minimally intrusive” (not minimised or absent) and only to the extent required to address any support need.

Under the next subheading The Support Framework the following was stated:

(a) Determining the nature of supports needed by children should be arrived at following discussion with caregivers;

(b) Lump sum payments do not discharge the Chief Executive’s responsibilities;

(c) The provision of support may be for issues requiring immediate ongoing intervention or may be a commitment to provision of such supports should need arise in the future.

(d) That the very qualities of a permanent placement should over time lead to a diminishment of a child’s care and protection needs. (Recognising that a child does not cease to be a child in need of care and protection on being permanently placed.)

The guide lists the supports that must be considered in any given instance. These were extensive, embracing the kinds of issues that the permanently placed child will present with given their particular legacy:

(a) Reasonable and actual legal fees to obtain COCA orders and to cover future family court proceedings should that be necessary;
(b) A contribution to reasonable clothing costs - not being more than is payable under the quarterly clothing grant regime;

(c) Reasonable costs of contact arrangements;

(d) Reasonable costs of kindergarten/Playcentre attendance and school activities and fees;

(e) Provision of reasonable social work support and/or counselling support/respite care – where the issues for the child derived from the care and protection experience are sufficient as to require social work and/or counselling assistance being given to the caregivers to assist in management of those issues;

(f) Provision of reasonable medical costs for an ongoing or chronic medical condition or reasonable medical costs associated with the abuse and neglect legacy;

(g) Reasonable support for recreational and cultural activities – to assist in addressing issues arising from the legacy and to improve self esteem, developing social skills;

(h) Reasonable support for additional clothing related to the care and protection needs, the example being to address soiling which may result in excessive wear and tear of clothing;

(i) Reasonable transport costs – to get the child to counselling, medical treatment etc and where this is not otherwise provided by the service provider.