The legal and practice implications of the s18A amendment to the Children Young Persons and Their Families Act 1989
ABSTRACT

This thesis examines section 18A of the Children Young Persons and Their Families Act 1989, which took force on 1 July 2016. The historical, drafting and rights issues associated with its enactment and its implications for child protection practice is the primary focus of the research. Section 18A is intended to prevent the potential risk of serious child maltreatment to a new class of statutory client called a 'subsequent child' by their parents who have either had a previous permanent removal of a child in their care or been convicted of the death of a child in their care. This approach is unprecedented in contemporary child protection law in New Zealand due to its focus upon the risk of potential harm as opposed to a forensic investigatory response to actual harm. In addition, the amendment was enacted quickly which precluded opportunities for commentary, debate and research. A research gap therefore exists relating to the implementation, interpretation and potential associated outcomes for vulnerable families who are targeted by the use of legal mechanisms such as section 18A.

This thesis attempts to address this research gap by developing a conceptual framework within which legal mechanisms such as section 18A can be situated. This conceptual framework compares the neglect and protection statutes that were enacted during the colonisation of Australia and New Zealand to draw parallels between Australian Aboriginal parents, children born to unmarried parents in New Zealand, and the two populations of parents identified under section 18B(1)(a) and section 18B(1)(b). Through the application of the framework, immediate challenges are identified relating to the drafting of the mechanism, its interpretation and the potential constitutional and human rights issues associated with section 18A’s enactment.
ACKNOWLEDGEMENTS

Ko wai au?

Ko Hikurangi te maunga

Ko Hikaroroa te mauka

Ko Uawa raua ko Waikouaiti nga awa

Ko Takitimu raua ko Arai te Uru nga waka

Ko Kai Tahu raua ko Ngati Porou oku iwi

Thank you, Emily K, Mark H and Shayne W for your tautoko which encouraged me to pick up the wero.

I dedicate this thesis to vulnerable children and their families.

I hope it helps.
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# GLOSSARY, ACRONYMS AND ABBREVIATIONS

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<td>The Australian Law Reform Commission</td>
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<tr>
<td>CA</td>
<td>Court of Appeal</td>
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<td>CE</td>
<td>Chief Executive of the Ministry of Social Development</td>
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<td>Child Harm Protection Orders</td>
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<td>Family Group Conference</td>
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<td>Legislative Advisory Committee</td>
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<td>MVCOT</td>
<td>Ministry of Vulnerable Children – Oranga Tamariki</td>
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Chapter 1: Introduction

On 1 July 2016, the section 18A amendment of the Children Young Persons and Their Families Act 1989 (CYFA1989) came into force. Section 18A is an innovative legislative response to increasing international calls for a shift in focus from providing only forensic statutory responses towards child abuse and seeking a more preventative approach for vulnerable children (Humphrey et al., 2010). Section 18A was enacted with the purpose of preventing the risk of potential harm to 'subsequent children' by their parents who have either had previous children removed permanently from their care or who have been convicted of causing the death of a previous child in their care. To achieve this purpose, the amendment creates a new class of statutory client called a 'subsequent child'. However, to achieve this purpose, section 18A was drafted with the use of complex legal mechanisms such as an automatic presumption of guilt, propensity evidence and a reverse onus of proof. The amendment is therefore arguably 'leading edge' in terms of Parliamentary drafting and child protection law and practice.

However, the implications for vulnerable families for utilising a statutory mechanism in a maltreatment preventative capacity is neither evidenced nor researched. Furthermore, the amendment places an obligation upon a statutory social worker to gather information and make an assessment for use in court about the prediction of risk of offending and previous removal behaviour. Social workers are therefore compelled to learn more about this system and to participate more fully with those who implement it.

This thesis therefore addresses the following research question:

What are the critical implications for vulnerable children and their families and social work law and practice in implementing section 18A of the Children, Young Persons, and Their Families Act 1989?

Chapter two provides a brief historical overview of child protection law in New Zealand. Through this overview, the author begins to advance the argument that the use of legal mechanisms in a preventative capacity, although novel in contemporary law and practice, was a significant characteristic of the care and protection statutes during colonisation. In addition, the chapter provides the reader with a fundamental understanding of the important constitutional milestones that occurred during New Zealand’s legal history.
Chapter three briefly introduces the reader to the section 18A amendment. It begins by providing the reader with an understanding of the four criteria needed to trigger a section 18A ‘assessment’ and provides an overview of important definitional terms such as subsequent child and the parent of a subsequent child.

Chapter four provides an overview of the research methodology with associated ethical issues.

Chapter five capitalises on the historical overview provided in chapter two by developing a four-stage conceptual framework within which the remaining chapters can be situated. The Crown’s last use of legal mechanisms such as section 18A was in the protection and neglect statutes enacted during the colonisation of both New Zealand and Australia. This framework will be used to analyse these neglect and protection statutes to capture the parallels between four diverse groups of parents: Aboriginal parents in Australia, children born to unmarried parents in New Zealand, section 18B(1)(a) and section 18B(1)(b) parents.

The remaining thesis situates section 18A within the conceptual framework and is structured accordingly. Stages three and four receive particular attention as stage three addresses the research question by describing the critical legal and practice challenges involved in implementing section 18A. Stage four addresses the research question by outlining the implications for the two populations of parents targeted by section 18A.

At stage one of the framework, chapter 6 provides an analysis of the reform process that led to the development of the section 18A amendment. The theoretical rationale that underpins section 18A’s enactment was revealed during this reform process. Chapter six analyses the role of the media and research as two dynamic factors that were highly influential in section 18A’s enactment. The chapter concludes by outlining the reform process itself.

Chapter seven is the only chapter dedicated to stage three, which highlights how section 18A raises a rebuttable presumption. The evidential issues for the two populations of parents targeted under section 18A are examined by comparing the significant procedural differences between an ‘investigation’ under section 17 and an ‘assessment’ under section 18A.
Chapter eight begins stage three of the framework analysis by identifying the practice challenges involved in developing a clear aetiology of child abuse. Challenges involved in defining child abuse and maltreatment from a knowledge-base perspective arguably compromises the ability to subsequently draft an effective legislative mechanism designed to prevent maltreatment. Inadequacies in drafting the mechanism represent a potential barrier to professional decisions when implementing the mechanisms in practice. Practice issues relating to the reverse onus of proof are also addressed.

Chapter nine develops stage two to greater depth by analysing the interpretational issues associated with the language used to identify the four criteria necessary to trigger a section 18A assessment.

Chapter 10 concludes stage two by providing an in-depth analysis of the interpretational issues associated with including an 'unborn child' within the definition of subsequent children.

Chapter 11 begins stage four by looking at the specific potential legal and practice implications associated with section 18B(1)(a).

Chapter 12 continues stage four by addressing the specific potential legal and practice implications associated with section 18B(1)(b).

Chapter 13 completes stage four by describing the potential impact on human rights when legal mechanisms are used to implement maltreatment prevention strategies. The chapter highlights the potential intergenerational traumatic and stigmatising effects these legal mechanisms can perpetuate when used inadequately as a maltreatment prevention strategy.

Chapter 14 provides a summary of the future research areas identified throughout the thesis.
Chapter 2: Historical Development of Child Protection Law in New Zealand

This chapter establishes a link between New Zealand's turbulent and conflicted colonial history and the enactment of the Children Young Persons and Their Families Act 1989. Through this analysis, strands of constitutional and legislative milestones relevant to the research question are identified. The analysis also reveals the embedded colonial knowledge-base discourses that continue to have an impact upon contemporary child protection social work law and practice, such as the section 18A amendment.

Te Titiri O Waitangi 1840

The Treaty was initially signed on 6 February 1840 between Northern Maori Rangatira on behalf of their 'hapu' and Lieutenant Governor William Hobson as the representative of the British Crown (Orange, 2015). Collectively, these groups of people had the ability to exercise (or abdicate) substantial public power in New Zealand (O'Sullivan, 2008). At the initial signing, not all hapu were represented (Ka'ai, 2004). To facilitate signing, copies of the Treaty were taken to various parts of New Zealand. By the time the Treaty was remitted to London in October 1840, over 500 Rangatira had signed it (Ka'ai, 2004).

The Treaty comprises a preamble and four articles¹. Over the years, the textual differences between the Maori and English versions of Treaty had given rise to much debate about the Treaty's meaning (Palmer, 2008). Hobson, and the overwhelming majority of Rangatira who signed the Treaty, signed only the Maori version (Orange, 2015). At its essence, it is undeniable that the Treaty was about who was to have the mandate to exercise public power in New Zealand in the years to come. Palmer (2008) argues the Treaty was therefore clearly a constitutional document and its formulation in 1840 a 'constitutional event' (p. 31). As a quasi-constitutional document, the exercise of public power in New Zealand is potentially limited by it – in certain circumstances. This theme is explored in greater depth in chapter 12.

¹ Three written; one verbal.
Neglected and Criminal Children Act 1867 (NCCA)

The NCCA signalled the first decisive growth of the Crown in welfare matters involving children (Twomey, 1997). The NCCA is argued to be a social policy document primarily driven by assumptions about gender relations. Colonial social observers referred to destitute children as the ‘Bedouins of the Street’ who must be “reclaimed from a condition of nomadic wilderness and brought within the pale of civilisation” (Twomey, 1997, p. 177). Reformatory schools were regarded as ‘compulsory’ to avoid children returning to inappropriate home environments. Children were regarded as materially and irrevocably compromised when they returned to ‘recalcitrant’ parents. These complaints about the too rapid return of destitute children to unsuitable parents were important shapers in colonial discourse about the potential criminality of destitute children (Norman, 2014).

Adoption of Children Act 1881

Under the Adoption of Children Act 1881, New Zealand was the first British country to make statutory provision for the adoption of children. Western adoption laws were a totally alien concept for Maori and have traditionally caused considerable anguish, especially care arrangements of Maori children following an actual incidence of neglect or abuse. The prevalence of Western opinion in influential areas of law that affirms the view that a Maori child is to be treated as an ‘individual,’ ignores the communal orientation of Maoridom (Barlow, 1994). For Maori, a child is not a child of their birth parents but of the family (whanau). Furthermore, the family is not a nuclear unit in space but an integral part of the tribal whole, bound by reciprocal obligations (Barlow, 1994; Ka’ai, 2004). Western adoptions were an ‘aberration’ to Maori because they assume lineage can be “expunged at birth and parental rights irrevocably traded” (Ministerial Advisory Committee, 1988, p. 75). Maori had their own customary adoption process called whangai (Barlow, 1994). At first, these were recognised by Western law but the term was erroneously used interchangeably with adoption. From 1901, it was required that whangai arrangements be registered to have legal status. Registration became important as it affected entitlement to benefit payments, housing and Maori land succession rights. By 1909, Maori adoptions needed to be registered with the Maori land court. In stark contrast, Maori people were not able to adopt European
children “as they were not living in a way we should consider proper for European children” (Ministerial Advisory Committee, 1988, p. 75).

**Industrial Schools Act 1882**

The Central Government’s administrative responsibilities in relation to children who were removed from their mothers or were offending were handled at first by the Department of Justice. In 1880, these responsibilities were taken over by the Department of Education which initiated a more active and enlightened policy. The Industrial Schools Act 1882 permitted the boarding out of children who were in the care of such schools. By 1895, 81 per cent of children from the schools directly controlled by the Department were in foster homes (Twomey, 1997).

**Child Protection Act 1890**

As early as 1890, the death of children resulting from maltreatment needed to be recognised and addressed in legislation. Child fatalities were also increasingly perpetrated by carers other than biological parents or legal guardians. In *Thompson v Grey*\(^2\) and *R v Foster*\(^3\) a woman having actual control of a child, although she was not the parent or legal guardian, was held to come within these provisions.

**Early 20th Century**

**Infants Act 1908**

In the late 19th Century, delinquent young women were seen as an especially menacing phenomenon. Their sins, especially extra–martial fertility, demonstrated the consequences of a bad childhood and their offspring threatened to transfer the evil to a new generation. (RCSP, 1988, p. 16) This hegemonic discriminatory attitude was beginning to surface in legislation as early as 1908. Boyd (2004) argues that colonialism resulted in the significant subordination of women because colonial history is based upon the premise that "...immoral women and women of colour are viewed as more deviant than their moral counterparts" (p. 28). Budd (2005) argues that moral regulations are constituted through the coming

\(^2\)*(1904) 24 NZLR457, 7 GLR 136  
\(^3\)*(1906) 26 NZLR 1254 GLR 179
together of historically specific cultures and legal tools. This thesis will demonstrate in the following chapters how section 18A is one ‘legal tool’ that Budd (2004) identifies as demonstrating a moral ‘regulation’.

The Child Welfare Act 1925 (CWA)

The CWA has been identified as the first, most substantial piece of care and protection legislation in New Zealand, as it formed the early foundations of contemporary care and protection practice in New Zealand (Twomey, 1997). Part III section 13(1) of the CWA set out the process under which the protective jurisdiction of the Children’s Court could be activated. If a child was being neglected, indigent, delinquent, or not under proper control or living in an environment detrimental to its physical or moral wellbeing, the parent(s) could be summoned to the Children’s Court to appear before the justice. It is immediately clear that the determination of many of the elements under section 13(1), such as neglect, not under proper control, or living in an environment detrimental to a child’s physical or moral wellbeing, required the exercise of a value judgement, a judgement that was only exercised by the Justice of the Children’s Court. This thesis argues this type of judicial decision making is replicated by the section 18A amendment because any decision making made by a social worker during the course of a section 18A assessment requires confirmation in the Family Court.

Children and Young Persons Act 1974 (CYFA1974)

In 1987, a working party provided a report to the Minister of Social Welfare, Michael Cullen, that described how the CYFA1974 was publicly perceived as:

(a) Inadequate in its resourcing of the Children and Young Persons Court;
(b) Ineffective in its ability to balance care and protection issues against offending issues within the same jurisdiction;
(c) Inadequate in resourcing effective procedures for dealing with child abuse;
(d) Ambiguous in relation to establishing clear practitioner roles due to the lack of appropriate guidelines, specifications and resources;
(e) Lacking accountability for decisions relating to placing children and young persons in secure residential facilities;
(f) Responsible for the ongoing perpetuation of racist and monoculture practice.
The CYFA1974 was instrumental in establishing the definition of child (0–14 years) and young person (14 years to 16 years), a dichotomy that is still relevant in contemporary care and protection practice. However, this dichotomy represents a challenge for the interpretation of subsequent child under section 18A.

One area of particular controversy related to the codification of the paramountcy principle. The CYFA1974 states:

> In consideration of this decree, the court must regard the welfare of the infant as the first and paramount consideration.

In simple terms, the CYFA1974 clearly established that the welfare of a child or young person took priority over the interests and welfare of the family. At the time, the ‘paramountcy principle’ was regarded as culturally insensitive because it “did not recognise that the interests of the child or young person can only be viewed as an integral part of a family unit” (RCSP, 1988, p. 12). Due to the mounting criticisms associated with the CYFA1974, a complete overhaul of the CYFA1974 was needed.

Children Young Persons and Their Families Act 1989

The CYFA1989 was initiated in 1983 by the Minister of Social Welfare, Mr Venn Young; however, it was not promulgated until 1989. During this 6-year period, the Bill was often subject to incompatible views primarily driven by the fundamental “divisions of New Zealand’s multi-cultural society” (RCSP, 1988, p. 6). During this 6-year time frame, the incumbent Minister Michael Cullen established a working party that recommended care and protection procedures and practice “exemplify the Spirit of the Treaty of Waitangi ...and any legislation affecting Maori enhance rather than erode mana whenua” (p. 7). This strategy was seen as critical if greater consensus relating to the new Bill was to be facilitated.
To achieve ‘greater consensus’, in 1985, the next Minister for Social Welfare, Jenny Shipley, charged the Maori Committee with “investigating and reporting to her from a Maori perspective, on the operations of one of the largest departments of State whose activities impinge on all sections of the community – the Department of Social Welfare” (Ministerial Advisory Committee, 1988, p. 7). The Committee’s terms of reference stated that its task was to advise the Minister on “the most appropriate means to achieve the goal of an approach which would meet the needs of Maori in policy, planning and service delivery in the Department of Social Welfare” (Ministerial Advisory Committee, 1988, p. 5). Puao te Ata Tu was the resulting report, which exemplified the renaissance in Maori thinking prior to the enactment of the CYFA1989. The report noted “…the historical perspective emphasizes the quantity of inherited laws, policies and practices, require substantial modification before Maori can be adequately catered for” (Ministerial Advisory Committee, 1988, p. 71).

CONCLUSION

This chapter introduces the reader to the primary protection and neglect statutes that characterised child protection law and practice in New Zealand during colonisation. The cyclical reform processes that have characterised the evolution of child protection law and practice in New Zealand is also described. This thesis argues that although child protection law and practice in New Zealand is constantly evolving through cyclical reform process, legal mechanisms such as section 18A were the dominant legal mechanisms used during colonisation and may therefore be better described as a colonial mechanism. On the face of it, section 18A would arguably appear to be a retrograde step in the evolution of child protection law and practice in New Zealand. To examine this theme, the thesis develops a conceptual framework to capture the parallels between four diverse groups of parents to highlight the disastrous outcomes that these mechanisms have historically wielded: Aboriginal parents in Australia, children born to unmarried parent in New Zealand, section 18B(1)(a) and section 18B(1)(b) parents.
Chapter 3: Introducing section 18A

This chapter introduces the reader to section 18A. Part 1 begins by introducing the four criteria necessary for a section 18A assessment to be triggered. These criteria, the relevant provisions and their associated definitions will be the focus of the remaining chapter. Part 2 describes the characteristics required to be defined as the 'parent of a subsequent child' under section 18B(1)(a) and (b) respectively. Part 3 proceeds to outlines the statutory definition of a subsequent child.

Part one

Four criteria triggering a section 18A assessment

Section 18A outlines four criteria that trigger a section 18A assessment:

- A person described in Section 18B; and
- is the parent of a subsequent child; and
- has, or is likely to have; the care or custody of the subsequent child and
- is not a person to whom subsection 7 applies

Under a section 18A assessment, a reverse onus of proof applies because a statutory presumption is made that a parent of a subsequent child represents a potential risk of causing serious harm to subsequent children in their care. A reverse onus of proof means that a subsequent parent has the evidential burden to prove that this risk will not happen, rather than the Crown proving that it will. Section 18A, as an assessment process, is significantly different to the usual investigative process under section 17.

Part two

Parent of a subsequent child

Section 18A identifies two specific groups of people, that is, those convicted of a specified offence against children, and those who have had children removed with no possibility of return.

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4 Section 18B(1)(a)
5 Section 18B(1)(b)
Definition of parent of subsequent children under section 18A

Section 18B (1)(a)

It is in section 18B (1)(a) that Parliament identifies its first group of what the White Paper describes as 'serious abusers'.

A person who has been convicted under the Crimes Act 1961 of the murder, manslaughter, or infanticide of a child or young person who was in his or her care or custody at the time of the child’s or young person’s death

Section 18B (1)(b)

Section 18B(1)(b) identifies what the White Paper describes as those to have been found, on the balance of probabilities, to have committed a specified offence against children:

as a person who has had the care of a child or young person removed from him or her on the basis described in subsection 2(a) and (b) and in accordance with subsection 2(c), there is no realistic prospect that the child or young person will be returned to the person’s care.

2(a) the court has declared under section 67, or a family group conference has agreed, that the child or young person is in need of care or protection on a ground in section 14(1)(a)\(^6\) or (b)\(^7\) and

the court has made an order under section 101 (not being an order to which section 102 applies) or 110 of this Act, or under section 48 of the Care of Children Act 2004 and

the court has determined (whether at the time of the order referred to in paragraph (b) or subsequently), or as the case requires, the family group conference has agreed, that there is no realistic prospect that the child or young person will be returned to the person’s care.

Section 48 of the Care of Children Act 2004 (COCA) refers to:

Parenting orders:

\(^6\) Section 14(1) a child or young person is in need of care or protection within the meaning of this part 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 depressed

\(^7\) The child’s or young person's development or physical or mental or emotional well-being is being, or is likely to be, impaired or neglected, and that impairment or neglect is, or is likely to be, serious and avoidable
(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 (whether an interim parenting order or a final parenting order) may be made subject to any terms or conditions the court considers appropriate (for example, a condition requiring a party to enter into a bond).

At the first reading of the amendment, it is immediately apparent that these two separate groups of subsequent parents may be affected differently by the amendment given the vastly different characteristics that the drafting of section 18A has used to identify them. For example, the population of parents under section 18B(1)(a) have been convicted of causing a child fatality through maltreatment. This is in stark contrast to the parents under section 18B(1)(b) where the children under their care survived their abuse. The potentially, vastly different stigma these two population of parents may attract and any associated discrimination may result in significant bias during professional decision making leading to inconsistent application of the amendment between the two groups.
Part three

Definition of Subsequent Child

Section 2 defines a subsequent child as:

    a child, born or unborn, who has a parent who is a person described in section 18B

The current definition of a ‘child’ is:

    a boy or girl under the age of 14 years

The jurisdictional expansion of section 18A by the inclusion of an unborn child within the definition of subsequent child represents a potential challenge of identifying the ‘child’ who is to benefit from the protections established under section 18A and is addressed in chapter 10.

8 Which has existed since the CWA.
Chapter 4: Methodology

When this research began, section 18A was not in force. Consequently, there is no data available to conduct quantitative research on demographic data trends or patterns. Furthermore, given its relatively recent enactment, opportunities for conducting qualitative research of those parents directly targeted by the amendment, or those professionals who might be involved with the section 18A process, is similarly limited. At such an embryonic stage of its enactment, the text of the amendment itself is the main focus of the thesis, and through critical analysis, potential issues and implications for section the 18A amendment are identified all of which may benefit from future research once section 18A has had an opportunity to be fully implemented in practice. Swaminathan and Mulvihill (2017) describe critical research as looking “beyond the immediate, to question that which we take for granted and seek connections between seemingly disparate ideas ...with an eye toward social change” (p. 4). This methodology is generically referred to as ‘unobtrusive’ research as it does not require the active participation of others and draws “social and cultural meanings from existing sources” (Liamputtong, 2009, p. 88).

Research material was gathered through primary and secondary research methods. Primary research consisted of the collection and analysis of published and non-published government papers and an analysis of public consultation documents, parliamentary and organisational records (including Hansard documents, organisational reviews, Royal commission reports), legal sources (primary Acts) and evaluation of the current amendments to the CYFA1989. The use of Hansard was particularly valuable in this respect as it provided an insight into the Parliamentary priorities for the body of reform that were influential for the enactment. Included within this material are judicial decisions that were analyzed in relation to the challenges in interpretation and the constitutional issues that are implicated by the amendment. Several documents relating to the Vulnerable Children policy process are publicly available on government and parliament websites. Case law was used in preference to legal commentary and academic research. Court of Appeal and Supreme Court cases were given a priority, which is standard in legal research.
Secondary research involved the collation and analysis of existing research into child welfare policies, practice and legislation in New Zealand and overseas. Databases that were searched included ProQuest psychology, ProQuest Social Sciences database, WestLaw New Zealand, Lexis Nexis NZ and ProQuest Central. Secondary research also used scholarly books, and peer-reviewed articles. These documents provided information and, more importantly, direction about the contemporary child protection issues the amendment was attempting to address and the challenges associated with adopting a legislative response in addressing these issues. A broad range of research was considered. Because of the legal parallels between Australia’s and New Zealand’s colonisation and the section 18A amendment, literature that described the outcomes of parents targeted by legal mechanisms, such as provisions like section 18A during colonisation, were regarded as highly relevant.

Strengths of the research

The collaboration between law and social work disciplines represents a significant strength of the research. This is particularly important as close collaboration between law and social practice will be crucial for successful implementation of the amendment. The research involving the legal interpretation of the drafting of the amendment could be supported with relevant legal research involving case law and legal commentary. In addition, the legal research involving the constitutional and human rights issues is well supported in New Zealand jurisprudence. However, the research relating to Treaty of Waitangi is prolific in both legal and social work knowledge bases.

Limitations of the research

Only one piece of literature made direct reference to the section 18A amendment itself. However, this reference was only made in footnotes.

The amendment that is the focus of the thesis was enacted quickly leaving very little time for robust debate and discussion prior to its enactment. Furthermore, the research was limited because the amendment would only come into force half way through the research project. As a result, there is little demographic data available upon which any early implications of its actual implementation can be obtained.
Chapter 5: Development of a four-stage conceptual framework

Although section 18A is unprecedented in contemporary child protection law, chapter five argues similar legislative approaches were the dominant legal mechanisms used during the colonisation of Australia and New Zealand to address those parents who, at the time, society regarded as representing a risk of potential harm to their children. Given the colonisation statutes were the last time legal mechanisms such as section 18A were enacted, the literature has not developed a conceptual framework within which they can be situated. Furthermore, since section 18A took force on 1 July 2016, the ability to generate any meaningful data or statistics that can be used to conduct research upon the outcomes associated with its enactment is yet to occur.

Part one addresses the above research gap by developing a four-stage conceptual framework for legal mechanisms, such as section 18A, that target the risk of potential maltreatment. Part two applies the framework to the protection and neglect statutes of Australia and New Zealand’s colonisation and section 18A. Through this analysis, section 18A’s origin as a colonial mechanism is revealed. In addition, the framework demonstrates the inherently destructive nature these mechanisms have historically wielded when they are used inappropriately or inadequately. It is therefore vital that at this early stage of section 18A’s enactment, the practice challenges involved in its implementation are adequately acknowledged and addressed.

**Part one:**

The development of a statutory child maltreatment prevention conceptual framework

Part two develops a four-stage conceptual framework for child maltreatment where prevention legal mechanisms such as section 18A can be situated.

The first stage identifies the distinct legal doctrine and theoretical rationale that underpin the mechanism being used. The theoretical rationale is fundamental to the operation of the mechanism as it justifies the legal categorisation of parents who are deemed to represent a potential risk of harm to children in their care. However, in a crude approximation of the underlying theory, the statutory drafting typically
oversimplified the theory into a collection of physical factors such as race or gender and social factors such as marital status or criminal history.

The clear distinction between these two factors is that a physical characteristic does not change, whereas social factors can potentially fluctuate rapidly over a person’s lifespan. However, professional decisions made pursuant to these mechanisms are made at an isolated point in time and lack ability to adapt to reflect changes in the underlying social condition. This chapter argues that the physical or social factor used is also likely to coincide with a particularly strong stigma surrounding the population of parents who are targeted by the mechanism. The added complexity is that social factors (e.g., prostitution) are arguably disproportionately represented by a physical factor (e.g., prostitutes during colonisation were predominately women). In terms of the research question, it is important to acknowledge that although a social factor may be specifically drafted into the mechanism, the associated outcomes may have potential implications for any associated disproportionate representation.

In contrast, the legal doctrine operates to justify professional decision making during the implementation of the mechanism. This part demonstrates that the ‘best interest of the child’ concept that emerged during the colonisation of Australia and New Zealand is the embedded legal rationale that also underpins the CYFA1989. The ‘best interest of the child’ concept is therefore another similarity that binds together the protection and neglect statutes enacted during colonisation and the section 18A amendment. The following analysis will demonstrate that the ‘best interest of the child’ concept is not only deeply embedded within CYFA1989 but has had its legal potency significantly reinforced by the paramountcy principle in section 13.

Stage two describes the practice challenges involved in not only defining the groups of ‘children’ these mechanisms are designed to protect but also identifying the population of ‘parents’ these children need protection from. Legal mechanisms such as s 18A have an inherent implication for an individual’s civil rights because a presumption is raised in the absence of proof. Therefore, accurate identification of the parents who are intended to be targeted by the mechanism is critical from a constitutional perspective to prevent the unintended limitation of an ‘innocent’ person's civil liberties. Therefore, one important indicator of these mechanisms’ efficiency is their ability to be implemented with precision.
Because of the focus upon potential harm, stage three involves describing the ‘presumption’ raised in relation to the parents who are identified in stage two. A legal presumption operates on the premise that although a parent may not have demonstrated actual harm to children in their care, nevertheless, because they exhibit certain social or racial characteristics, they enter a legal category where they are presumed to represent a high risk of potential harm to children in their care. At stage three, accurate identification of the type of presumption raised is pivotal as some presumptions are rebuttable (as in section 18A) but others are not (as the following analysis will demonstrate).

The final stage involves identifying the nature of the interventions that stemmed from the presumption and the potential outcomes that are associated with the use of legal mechanisms such as section 18A. Stage 4 of the framework highlights that these interventions varied in severity with associated implications for constitutional and human rights, not just for the parents who are identified but also for their children.

**Part two**

Application of the statutory prevention framework to the Australasian colonisation statutes.

In terms of the research question, the application of the conceptual framework to the protection statutes enacted during the colonisation of both Australia and New Zealand is important because within these countries, Aboriginal parents in Australia and children born to unmarried parents in New Zealand were the first population of parents to be subject this type of mechanism. From this first population of parents, the ripple effect of the ongoing intergenerational trauma these legal mechanisms have caused is well documented in the literature (Broadhurst & Mason, 2013; Buti, 2004; Douglas & Walsh, 2009; Douglas & Walsh, 2013). By comparing this population of parents with the parents identified under section 18A, the highly vulnerable characteristics of all these groups of parents is accentuated, as similarities between them are established. This comparison therefore highlights the potential intergenerational traumatic and stigmatising effect these legal mechanisms can perpetuate when used inadequately as a maltreatment prevention strategy. Through this analysis, the challenges associated with drafting legal mechanisms such as section 18A to implement child maltreatment
prevention strategies to address potential as opposed to actual harm are also illustrated.

**Stage one**

Describing the legal doctrine underlying the legal mechanism.

The 18\textsuperscript{th} century is regarded as the catalyst for change in relation to guardianship law as judges became willing to intervene in the parents’ upbringing of their children. The colonisation of both Australia and New Zealand coincided with this catalyst that represented a fundamental change in English law around the concept of a ‘child’, their ‘rights’ and associated ‘parental obligations’. This conceptual shift, known as the ‘best interests of the child,’ has since established a long line of precedent and is the primary legal rationale embedded within contemporary child protection law and practice in New Zealand and the United Nations Convention on the Rights of the Child. The development of the ‘best interests of the child’ was initially prompted by the need to protect the rights of certain aristocratic children, who, by their birthright, would enter into important political spheres such as the House of Lords (Buti, 2004).

The ‘best interest of the child’ is the legal doctrine used to leverage the rights of the child against other competing interests such as parental rights. For example, in 1893 in the Court of Chancery, in *Re McGrath (Infants)*,\textsuperscript{9} Lord Justice Lindley stated:

> The dominant matter for the consideration of the court is the welfare of the child...the word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. (p. 16)

As noted in chapter 2, the NCCA was the first statute in New Zealand to facilitate increased judicial involvement in matters that specifically related to children (Twomey, 1997). Following the NCCA, the Infants Act 1908 mandated judges to prioritise children’s’ interests over other competing interests. Section 8 stated:

“... the court must regard the welfare of the infant as the first and paramount consideration” (marginal note, p. 1071, The Infants Act 1908).

\textsuperscript{9} [1893] 2 QB 232, 243
Almost identical wording has been duplicated in section 13(1) of the CYFA1989:

Every court or person exercising powers conferred by or under this Part, ...must adopt, as the first and paramount consideration, the welfare and interests of the relevant child or young person.

To reinforce this approach, section 13(2) states:

In determining the welfare and interests of a child or young person, the court or person must be guided by the principle that children and young people must be protected from harm and have their rights upheld.

Section 13(2) provides statutory reinforcement that children’s rights are ‘upheld’, even if the exercise of those rights conflicts with parental rights.

Describing the dynamic and static factors and associated theoretical rationale underlying the legal mechanism

In Australia, that static factor was clearly race. The underlying theoretical rationale that drove the enactment of the protection statues was the ‘dying pillow’ or the ‘dying race’ concept (Buti, 2004). Buti (2004) argues the enactment is a discriminatory attitude is attributed to the stigma relating to indigenous mothers during colonisation. Douglas and Walsh (2013) argue that the stigma and associated discrimination were just as powerful in contemporary Australian society during colonisation, and colonial removal policies are continued “by stealth” (p. 9). Buti (2004) argues the stigma and discrimination towards Aboriginal parents was driven by theories around social Darwinism and eugenics. Clearly, this body of theory has since been ‘debunked’ (Foner, 1992; Resnik, 1994). However, at the time, it was highly influential and dominated child protection law and practice for almost four decades (Douglas & Walsh, 2013). In contrast, during colonisation in New Zealand, correlations between poverty, criminality, and female-headed households were made. This correlation was driven by stigmatisation that developed discriminatory assumptions about gender and class relations (Twomey, 1997).

Mothers who were prostitutes or had given birth to children illegitimately attracted a stigma and were therefore regarded as representing a particularly high risk of causing potential maltreatment to children in their care (Newman, 2014). The author argues
that the stigma relating to children born to unmarried parents children exhibits an extraordinary potency and resilience that can be traced to the development of infanticide law. Infanticide was not a specific offence in any jurisdiction until 1922 in England, but the offence was preceded by a long history of legislative attempts to deal with problems seen to be presented by child murder. A 1624 Statute (21 Jas I.27) entitled “an Act to prevent the destroying and mutherling of bastard children” was the first legislative attempt to deal with the perceived inadequacies in the law of homicide as it applied to newly born infants.

This rationale, when used in conjunction with the ‘best interest of the child’ doctrine justified direct judicial intervention into the lives of mothers considered to be inferior to their middle-class observers (Newman, 2014). Furthermore, this intervention needed to be ‘compulsory’ to avoid children returning to an “inappropriate home environment before any useful training could be affected” (Twomey, 1997, p. 177). During the colonisation of both Australia and New Zealand, the underlying rationale for both approaches established a theory of ‘civilization’ which postulates an ‘a priori deficiency’ (Buti, 2004).

In other words, separation was said to be in the children’s 'best interests' because Aboriginal parents in Australia and children born to unmarried parents in New Zealand were stigmatised as inherently deficient. No evidence of actual deficiency was required (Buti, 2004; Heather Douglas & Walsh, 2013; Newman, 2014; Twomey, 1997). This perspective was arguably driven by the strength of the social stigma that contextualised the enactment during that period. As outlined above, the stigma surrounding these two groups of parents was not only acute but exhibited an extraordinary resilience. This chapter argues the stigmatisation from this colonial period is inadvertently embedded within the contemporary use of these mechanisms such as section 18A.

Under section 18A, parents with removal or criminal history are likewise presumed ‘deficient’. Unlike Aboriginal parents during colonisation, where the theoretical rationale was purely racially motivated, parents who are identified under section 18A have a history of serious abuse causing harm and child fatality. Initially, this history ostensibly justifies the section 18A enactment. However, the predicative ability of previous permanent removal history to identify parents who represent a future risk of maltreatment to subsequent children is at best unequivocal, and largely unsupported by
the literature. Furthermore, the author is unable to identify any research that tests the reliability of the use of criminal conviction data to identify parents who will harm subsequent children in their care.

However, similar to Aboriginal parents in Australia and children born to unmarried parents children in New Zealand, the two populations of parents under section 18B(1)(a) and (b) occupy a marginalised position within New Zealand’s contemporary society that is also highly stigmatised. Furthermore, although section 18A identified social factors as representing a potential risk to subsequent children, the resulting legal category may be disproportionately represented by a physical factor such as ethnicity. Therefore, irrespective of the social factors that influenced the drafting of the mechanism, the actual outcomes represent significant potential implications for a disproportionate population who are highly stigmatised and occupy a particularly vulnerable and marginalised social context. This thesis argues that awareness relating to the potentially disproportionate representation of Maori within section 18A merits particular attention and is fully addressed in chapter 12.

The use of legal mechanisms such as section 18A in the neglect and protection statutes of both Australia and New Zealand was an exercise in overt racial and gender discrimination. Nevertheless, these statutes dominated Australia and New Zealand child protection practice for many decades. The gender discrimination that was reflected in the protection statutes of New Zealand’s colonisation history is also potentially embedded within the section 18A enactment. For example,

section 18A(3)(a) states

a person meets the requirements of this subsection if, —

(a) in a case where the parent’s own act or omission

In the next sub paragraph, the section goes on to state:

(b) to allow the kind of harm

Section 18A(3) therefore exhibits an underlying rationale that may exhibit a discriminatory attitude towards victims of domestic violence who fail (i.e., omission) to act to prevent incidences of violence thereby allowing the abuse to occur. Given the majority of domestic violence victims are women, section 18A therefore reflects a
potentially embedded gender bias, the origins of which can be traced to the early New Zealand colonial protection statutes.

**Stage two**

Identification of parents with physical and social factors who represent a high risk of potential harm to children in their care

When using the conceptual framework to analyse the colonisation protection and neglect statutes, it becomes clear that inadequate drafting of these legal mechanisms resulted in interpretational ambiguities that created practice barriers to their implementation. One consistent theme emerging from this analysis is that those families that were targeted by these mechanisms were often unable to be accurately identified. This lack of clarity resulted in abusive professional practices which had a significant, negative ‘knock on’ effect for the families that were targeted.

The prevalence of wife desertion was a significant factor in New Zealand colonial life (Newman, 2014). The resulting stigma was arguably influential in the development of marital status as a social factor used to identify mothers who represented a risk of potential harm to children in their care. Section 2 of the Adoption of Children Act 1881 identified children born to unmarried parents as requiring an immediate statutory maltreatment prevention intervention. A few decades later, under section 78 of the Infants Act 1908, parents who were divorced could be held to be—

unfit to have custody of the children if any

However, what was not clear was whether widowed mothers qualified under these Acts. For example, if a widowed mother with legitimate children subsequently entered into a relationship where she had further ‘illegitimate children’, the statutes are not clear whether these illegitimate children ‘tainted’ the status of her previous legitimate children. Furthermore, this simple example highlights the identification difficulties that arise when social factors, because they are subject to rapid change during an individual’s lifespan, are used to construct legal categories within mechanisms such as section 18A.

In contrast, the Australian neglect and protection statutes used race as the physical characteristic to identify parents who represented a risk of potential harm to children in
their care. When viewed purely from an interpretation perspective, one could argue that the use of a physical factor would minimise opportunities to create ambiguity, minimising the scope for the development of professionally abusive practice. However, as the following analysis illustrates, interpretation difficulties were evident for two reasons. First, the drafting of the mechanism created barriers for practical implementation. Second, although an individual's physical characteristic over their own lifespan remains stable, their demographic of the population itself can change rapidly over time, creating challenges for implementation.

In the Australian colonisation protection and neglect statutes, full-blooded Aboriginal parents were regarded as representing a higher risk of potential harm than ‘mixed breed’ Aboriginal parents (Buti, 2004). Although the protection and neglect Acts attempted a definition of Aboriginality, the legislation was poorly drafted and contradictory, which led to arbitrary and inconsistent interpretation and decision-making bias (Buti, 2004). For example, The Chief Protector defined a "quadroon" as the "offspring" of a half-caste woman, by a "white" father. However, no further explanation was provided as to how the Department made the distinction between a 'half-breed' and half-caste, and a 'native' and an 'Aboriginal'. In the absence of complete information, the practice developed for decision makers to “assess” degrees of ancestry were determined on visual observation of colour. Furthermore, subsequent amendments allowed a court, judge, or magistrate to determine aboriginality “if having seen such a person the subject was, in their own opinion, Aboriginal. Therefore, the two categories of aboriginal children could arguably be expanded arbitrarily following these amendments.

Similarly, in relation to section 18A, the drafting of the amendment itself raises potential interpretational difficulties making the accurate identification of a 'parent of a subsequent child' and a 'subsequent child' a challenge for its practical implementation. For example, the definition of subsequent child includes an ‘unborn’ child within its definition. This approach is unprecedented in the history child protection law in New Zealand, making this interpretation issue a significant challenge in statutory social work. For example, no statutory guidance has been provided as to the exact stage of

10 Aborigines Protection (Amendment) Act 1909 (NSW), s 18B.
11 Most of the population 'growth' through the use of this mechanism occurred in the ‘half-caste’ category.
pregnancy section 18A's jurisdiction applies. This theme is explored in greater depth in chapter 10.

**Stage three**

**Identification of the presumption being raised.**

Section 18A raises an automatic presumption that a parent under section 18B(1)(a) and (b) represents a high risk of potential serious harm to subsequent children in their care. A presumption is a 'legal inference' as to the existence or truth of a fact not certainly known. This legal inference is drawn from the known or proved existence of some other fact. In relation to the parents of subsequent children under section 18A, this legal inference is dictated by the probability of risk of harm or abuse because parents categorised under section 18b(1)(a) have criminal convictions for causing the death of a child and section 18B(1)(b) parents have permanent removal history. Therefore, based upon this history, an inference is made that they are likely to offend or abuse again. However, unlike full-blooded Aboriginal parents during Australia's colonisation, section 18A allows a parent under 18B(1)(a) and (b) to produce evidence to the Family Court that this 'legal inference' or presumption does not apply to their current individual circumstances. In legal terms, this is called 'rebutting' a presumption.

Rebutting a presumption introduces additional complexity around the requisite evidential burden that is required to satisfy the rebuttal. The Family Court holds the jurisdiction for deciding matters in relation to family law and is therefore where a rebuttal under section 18A would be presented for disposition. A rebuttal in this jurisdiction can be satisfied by meeting an 'on the balance' evidential burden.

In 1865, a child with an Aboriginal mother was presumed neglected (Kidd, 2000). Full-blooded Aboriginal parents were presumed to represent a higher risk of harm to children in their care than mixed breeds. As a result, the presumption in relation to Aboriginal parents identified as full-blooded was not rebuttable. However, in certain circumstances, mixed-breed Aboriginal parents could rebut the presumption to a limited extent so that they could apply to the Court to resume parental guardianship of their children.

In New Zealand, section 2 of the Adoption of Children Act 1881 presumed a child 'deserted' if it was born illegitimate and in the care of its mother. This was a non-
rebuttable presumption. A few decades later, a presumption was raised under the Infants Act 1908 that children in single-parent families\textsuperscript{12} were at a potential risk of harm. The ‘parent’ could rebut the presumption that they were ‘unfit’ to have custody of their children. However, the potential harm associated with mothers was regarded as higher than that of the father. As a result, the associated burden of proof for making a decree against a father as opposed to the mother required a very high evidence of unfitness.\textsuperscript{13} A few decades later, the CWA presumed a child neglected if “not under proper control or living in an environment detrimental to its physical or moral wellbeing”\textsuperscript{14}. This was also a non-rebuttable presumption.

In relation to section 18A, a rebuttable presumption is raised in relation to the two separate groups of parents identified under the amendment. Although the burden of proof technically falls upon the two groups of parents identified, it is a statutory social worker who collects and presents the evidence for rebuttal at disposition. Rebutting the presumption under section 18A is therefore a two-staged process. First, a statutory social worker completes an ‘assessment’, of which there can only be one of two outcomes: either a declaration or a confirmation. Following this assessment, the outcome is also presented to the Family Court for disposition. The issues relating to the burden of proof for the two sets of parents identified under section 18B(1)(a) and (b) are covered in depth in chapter 6. Although parents of subsequent children under section 18A have a rebuttable presumption, it is an evidentially complex and technically onerous process.

**Stage four**

Under the colonisation statutes, the interventions were severe and irrevocable. Permanent automatic removal and detainment of children and removal of parental rights characterised the statutory interventions implemented. The Aborigines Protection Act 1869 (Vic) and the Aborigines Protection Act 1886 (WA) provided the initial statutory power to remove Aboriginal children from their families. Aboriginal children were triaged into one of two categories: Full-blooded or ‘mixed-breed’

\textsuperscript{12} Through a divorce or separation
\textsuperscript{13} Woolnoth v Woolnoth (1902)
\textsuperscript{14} Section 13(1)
Aboriginal children. These two categories determined the interventions that flowed from the statutory presumption. In addition, all Aboriginal children were placed under the sole ‘guardianship’ of the Protectorate.

Full-blooded children were restricted to live in ‘reserves’. Once residing in these reserves, all civil liberties relating to every facet of their lives were completely abrogated for the remainder of their life. In contrast, half-caste Aboriginal children were sent to special reformatory schools to be trained as either domestic (female) or farm labourers (male). Following their ‘training’, these children were sent to work in rural areas so that their assimilation into white Australian society could be effected. Sexual exploitation of Aboriginal girls often became an ‘inbuilt’ requirement of employment under removal policies. As a result, interventions for half-caste Aboriginal children became exceedingly complex due to the rapid growth of the half-caste Aboriginal population following the ‘assimilation’ of their Aboriginal mothers.

In New Zealand, automatic removal was also the primary statutory response for the presumption raised by the colonisation neglect and protection statutes. Section 3 of the NCCA stated:

> it shall be lawful for the Superintendent of any province in New Zealand to establish for the purposes of the Act industrial schools and every such school to be occupied by and used for males or females exclusively as any such Superintendent may direct.

This section established reformatory schools where children deemed to need care and protection were sent. This approach dominated child protection interventions in New Zealand until the end of the century. Stanley (2016) described the establishment of these institutions as an exercise in state violence against children.

New Zealand was also the first British country to make statutory provision for the adoption of children. When a child was presumed “deserted,” the district judge stated:

> In the case of a deserted child, without such consent and on being satisfied that the applicant is of sufficient ability to bring up the child, and that the interests of the child will be promoted by the adoption make an order authorising the adoption.
When a child was presumed ‘deserted’, no consent was necessary from the mother to authorise adoption. When adoption occurred, the child was deemed in law to be the child ‘born’ in lawful wedlock of its adopting parents.

As outlined above, rebutting the presumption under section 18A requires disposition following a social worker assessment. When viewed this way, it is arguable that the section 18A process itself represents a potentially onerous and traumatic intervention. The CYFA1989 states under section 18A(2) that a social worker must:

\[ \text{inform the person that he or she is to be assessed under this section.} \]

The already limited opportunities for a statutory social worker to facilitate meaningful engagement with clients and their families is arguably further restricted under section 18A by this requirement. The difficulties in ‘quoting’ the CYFA1989, explaining the operation of these complex legal mechanisms before starting an assessment represents a potential barrier in facilitating the engagement necessary to achieve a good quality assessment. Therefore, this requirement has the potential to significantly compromise the objective of the amendment. More research into this aspect of initial client engagement and practice development under section 18A is therefore needed. For example, as a section 18A assessment will require disposition in the Family Court and a parent of a subsequent child have the burden of proof, will a statutory social worker have the requisite ethical and legal obligation to advise a subsequent parent to seek legal advice at initial engagement?

Disposition can have only one of two outcomes: either a confirmation or a declaration is made. If the presumption is unable to be rebutted, a declaration is made, triggering a statutory intervention. The first critical point about the declaration is that the requirement for an FGC to be held is waived. The implications for this exclusion is examined in chapter six.

**Conclusion**

The application of the conceptual framework revealed several important implications for the enactment of legal mechanisms such as section 18A. First, the population of parents who are targeted by these mechanisms tend to occupy a time where they attracted strong social stigma, whether based upon static factors such as race or social factors such illegitimate parenting. Also, the operation of a social factor tends to be
complicated because often there is a disproportionate representation of a static factors within the population targeted, such as gender or race. This social stigma these physical and social factors attract is arguably highly provocative in triggering Crown responses. This framework reveals that historically one of those responses involved enacting legal mechanisms, such as section 18A, to potentially assuage dominant public opinion.

The framework also demonstrates that the language used in the drafting of the legislative mechanism itself represented a significant challenge for the practical implementation of these mechanisms. Inadequacies in drafting the mechanism created practice barriers for implementation which were resolved through erroneous and discriminatory professional decision making that ultimately resulted in significantly poor outcomes for the children and their families these mechanisms targeted. These themes are addressed throughout the thesis as this addresses a significant proportion of the research question.

The framework established that the legal doctrine and the theoretical rationale have a symbiotic relationship. At any given point in time, the theoretical rationale reinforces the social stigma that develops in relation to a population of parents deemed to represent a risk of maltreatment to children in their care. The legal rationale justifies the enactment of the mechanism in a preventative capacity and professional decision making during its practical implementation. What also emerged from this analysis is that the ‘best interest of the child’ legal doctrine has not only demonstrated considerable resilience but has evolved significant capability within global contemporary child protection law and practice to provide the use of mechanisms such as section 18A with the very real potential to allow abusive professional practice to flourish.

Social context and professional practice is one of the significantly distinguishing features between the implementation of the protection and neglect statutes during colonisation and the implementation of section 18A. Professional decision making during the implementation of these colonial statutes was made by Crown bureaucrats in Australia and magistrates in New Zealand. Since then, contemporary social work practice has evolved a dedicated and regulated profession. Although registration is not mandatory in New Zealand, it is a mandatory requirement for statutory social workers. Furthermore, contemporary society has a highly developed voluntary, NGO and health
sector that have highly valuable expertise to adequately implement maltreatment prevention strategies to target the two populations of families identified by section 18A. In comparison to contemporary professional decision making, colonial decision making was archaic and anachronistic at best and therefore potentially explains the abusive practices that developed during this time.

This chapter argues that the legal mechanisms that were implemented during colonisation were a Crown response to the social stigma that created a perception of risk by specific populations of parents. However, unlike contemporary society, there was no other welfare infrastructure that could be implemented to address these perceived problems in a preventative capacity. As a result, colonial New Zealand and Australia could only rely on mechanisms such as section 18A to address the perceived risk. However, despite this evolution, on 1 July 2016, the Crown enacted section 18A, a colonial mechanism that returns ultimate decision making in relation to two specific population of parents back to the magistrate. This is despite contemporary society having a highly developed secondary prevention sector. The enactment potentially signals a Crown mistrust of contemporary statutory social work practice to adequately assess the risk of the two specific populations of parents identified under section 18A.

This thesis concludes by arguing section 18A’s enactment is the Crown’s response to the social stigma these two specific populations of parents have attracted in contemporary society. The following chapter argues contemporary society’s stigma for these two specific populations of parents is partly motivated and influenced by the media attention child fatalities and incidences of serious maltreatment attract.
Chapter 6: Stage one – identifying the theoretical rationale that justifies the amendment

One significant difference between the parents targeted during colonisation and section 18A parents is that the protection and neglect statutes during colonisation were enacted in their entirety without any pre-existing statutory regime. Section 18A is an amendment and owes its existence to the reform process that preceded it. It is during this reform process that important theoretical rationales that underpin section 18A’s amendment emerge. In addition, the media’s role in influencing the reform process is highlighted as the media is one factor that arguably contributes to the resilience that stigma in relation to vulnerable parents continues to demonstrate. This stigma therefore contributes to Budd’s (2005) earlier argument that moral regulation is often constituted through legal tools such as section 18A.

Section 18A reform process

On the 5th of March 2011 Mel Smith provided a report to the Honourable Paula Bennett following the serious physical abuse of a 9-year-old girl (M). This one-off incident was the catalyst for a review of the welfare, safety and protection of children in New Zealand. In his introduction, Smith (2011) states:

...I have never before experienced the depth of sadness, anger and frustration about the deliberate harm inflicted on some of our children. The sad fact however is that cases such as the Aplin children, James Whakaruru, Nia Glassie and the Kahui twins and the case giving rise to this inquiry, keep on occurring all too often. (p. 5)

Smith’s (2011) statement above reflects Warner’s (2014) observation that “the political work that is done through the ritual roll call of children’s names is important to understand with regard to the emotional politics that is in operation” (p. 142). As Smith (2011) outlined in his report, “I have never before experienced the depth of sadness, anger and frustration about the deliberate harm inflicted on some of our children” (p. 5).

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15 Minister for Social Development and Employment
Warner (2014) highlights the importance of “collective remembering...which can be understood as a form of social action” (p. 69) that drives reform. For Budd (2005), this accentuates the need for moral regulation through a statutory response. Warner (2014) argues the type of commemoration demonstrated by Smith’s (2011) statement above creates an “impulse to rescue children” (p. 69).

This thesis argues it arguably goes beyond ‘rescue’ to include punitive elements. For well over two decades, New Zealand already possesses an extensive range of care and protection legislative and practice architecture that satisfies protection impulses. However, like the parents that were targeted during colonisation, the section 18A amendment identifies “two populations of parents” who can be held out as responsible for Smith’s (2011) “depth of sadness, anger and frustration about the deliberate harm inflicted on some of our children” (p. 5). This is evident when looking at the reform introduced by section 18A – the subsequent parent legislation and the constitutional implications associated with the amendment. Specifically, it is the interface between the New Zealand Bill of Rights Act 1990, the Treaty and International Conventions such as the United Nations Convention on the Rights of the Child and section 18A of the CYFA1989. This thesis argues the 18A amendment potentially crosses jurisdictional boundaries between protection and punitive objectives which may have negative implications for the families that it targets.

Opening of the policy window

Kingdon (1984) first coined the phrase the ‘opening of the policy window’ to describe accelerating cycles of crisis and reform prompted by public administration accountability issues. In its broadest sense, accountability is described as being answerable to stakeholders for performing up to expected standards, duties and obligations (Lawton & Rose, 1991). The opening of the policy window therefore provides a framework for an explanation of the factors that led to a suite of legislative changes implemented by the VCA. This thesis provides an in-depth analysis of section 18A of the CYFA1989, a fraction of the raft of legislative and practice changes implemented by the recent child protection reform in New Zealand. This chapter will provide the reader with a critical understanding of the necessary political and social context that was influential in the opening of the policy window which shaped the vulnerable children reform leading to the enactment of section 18A.
Humphreys et al. (2010) identified ‘negative drivers’ and ‘dynamic factors’ as influential in the creation of an ‘auspicious political climate’ that is a necessary pre-condition for the opening of the policy window. Part 1 of this chapter focusses upon the availability of ‘particular discourses’ Humphrey et al. (2010) describe as ‘the dynamic factors’ critical in the underpinning of effective reform. This part will focus upon the Smith (2011) report, the International Literature Review (Kerslake Hendricks, 2012) and A Review of Selected Literature (Cram, 2012) and their role as ‘dynamic factors’ in the recent child protection reform in New Zealand.

The ‘refocusing debate’ represents an underlying theme expressed in these theoretical discourses. The ‘refocusing debate’ reflects an international call for a ‘paradigm shift’; “seeking to resource support for vulnerable children and their families rather than providing only a forensic, investigative response” (Humphreys et al., 2010, p. 146). The ‘refocusing debate’ therefore advocates for a shift in child protection practice from actual harm and associated forensic responses towards potential harm and preventative strategies. Part 2 of this chapter focusses upon ‘bad media’ as a distinct ‘negative driver’ that Humphrey et al. (2010) observes is “a fact of life in managing child abuse and child protection” (p. 153). The media is regarded as a ‘negative driver’ because it is highly influential and has the potential to “drive the reform in directions that is not good policy” (Humphreys et al. 2010, p. 153). Part 3 then discusses how the recent child protection reform in New Zealand ultimately led to the section 18A amendment.

**Part one**

**Dynamic Factors**

Humphreys et al. (2010) identifies research as one key dynamic factor in the reform and policy-making process. Research is critical in the provision of knowledge-base discourses that fuel dynamic factors that sustain reform development. Various types of research are identified as having varying levels of influence over the reform process. For example, research that involves administrative data analysis is regarded as both highly influential and can significantly determine reform development (Lewig, Arney, & Scott, 2006). In 2006, the Chief Social Worker in New Zealand, Marie Connolly, reported to MSD that caution be exercised when using administrative data to establish “perpetrator related factors to inform reform” (New Zealand CYF, 2006, p. vi). For Connolly, because
New Zealand is a small country and child maltreatment fatalities are so rare, any trends identified using administrative analysis produces significantly volatile data (New Zealand CYF, 2006). However, the report did conclude that younger children are at a significantly higher risk of fatality than older children. This report found that 30% of fatalities in New Zealand occur in the under-one age group and 63% in the under-five age group. However, their associated diverse environmental backgrounds made predictive risk-based modelling almost impossible (New Zealand CYF, 2006).

The Smith (2011) report was influential in the current New Zealand child abuse reform process. Within his report, Smith (2011) made specific reference to the Lord Laming’s (2003) death review of Victoria Climbe in the United Kingdom. Smith (2011) highlighted the similarities between the Climbe case and M, such as the intensive involvement of multiple agencies over a long period and the significant lack of agency communication that attributed to M’s abuse and Climbe’s death. In their recommendations, both Laming (2003) and Smith (2011) identified the imperative for the facilitation of agency collaboration through greater information-sharing practice so that a child-centred perspective could be better facilitated. Smith (2011) regarded information sharing as “incontrovertible for those involved in child safety, welfare and protection” (p. 93). As a result of Smith’s recommendation, significant reform of information sharing agreements between MVCOT and other agencies has been implemented in the current child protection reform in New Zealand. However, in his report, Smith (2011) requested “urgent action is taken to commission evaluative research to inform legislative developments and changes in social work practice” (p. 84). This request was in recognition of the well-established jurisprudential criticisms of the potentially disastrous consequences for child-protection practice when legislative mechanisms such as section 18A are used directly as a strategy to address social problems such as serious child maltreatment (Lonne, 2008).

Death reviews and inquiries, such as the Lord Laming (2003) report into the death of Victoria Climbe in the United Kingdom, is another type of research that is highly influential in the reform process and only pivotal if it triggers an immediate reform process. Humphrey et al. (2010) observed that inquiries and reviews can only be beneficial “if you have a reform process that is informed by a review but not a response
to a child death then you can have change that does not have to be immediate and therefore is given greater consideration” (p. 155).

The Smith (2011) report was critical of the “absence of useful research ...which means that practice and the law are created in a vacuum of knowledge and are guided by ideology rather than by factual data” (p. 10). Humphreys et al. (2010) found that academic research and evidence “was used to strategically support reform rather than shape reform” (p. 156). For example, research in social work theory that demonstrate correlations between previous permanent removals and future maltreatment risk supports recent reforms such as the enactment of section 18A. This line of theory was influential for Cram (2012) who observed “having a previous child removed from parental care is likely to indicate risk to subsequent children” (p. 33). Therefore, acknowledgment of the role that research can play in child protection reform is necessary in understanding how research facilitates amendments such as section 18A.

This part will also focus upon two literature reviews commissioned by the Minister for Social Development, Paula Bennett, from the research and evaluation team at the New Zealand Families Commission. These reviews were completed in January 2012. The first was an International Literature Review on the safety of Subsequent Children (Kerslake-Hendricks, 2012). The second was a review of Selected Literature on the Safety of Subsequent children, with a specific focus upon Maori children and their whanau (Cram, 2012). The section 18A amendment was largely supported by these two literature reviews. The influence of these literature reviews was immediately apparent by the enactment of section 18A and its objective to reduce the risk of potential harm to subsequent children who have had siblings removed from the care of either one or both of their parents. The reviews highlighted aspects of contemporary child-protection knowledge trends that were instrumental in the enactment of the section 18A amendment.

Subsequent Children Literature Reviews

Kerslake-Hendricks (2012) states that “enhancing the ability to identify families where children are likely to be at risk, particularly those families where children have already been removed, is the key behind this review” (p. 14). The report highlighted, however, the existence of a research gap in relation to families who have a history of statutory
removal. However, her literature review did identify a trend in academic literature that identified chronic neglect as opposed to physical abuse as the primary maltreatment prevention intervention that requires targeting in subsequent families. Kerslake-Hendricks (2012) acknowledged “there is little evidence of what works with neglect and more research is required” (p. 10). The review identified early identification as key in maltreatment prevention. Cram (2012) expressed concerns about vulnerable families coming to official notice, but monitoring subsequently ceases” (p. 15). Kerslake-Hendricks (2012) explored the concept of an ‘always open file’ as a “means to alert health and other professionals to potential risks of subsequent children” (p. 15). Through the operation of an ‘automatic presumption,’ the section 18A amendment achieves the purpose of an ‘always open file’ as parents of subsequent children will always be ‘flagged’ in the system until they have rebutted the presumption. This enhances the monitoring characteristic of section 18A. However, the Independent Experts Forum made no reference to the emerging body of research around surveillance bias and how this may explain the number of re-notifications for families that have previous removals (Widom, Czaja, & DuMont, 2015).

Maori Literature Review

The project brief to the Families Commission from Minister Bennett for the Maori literature review was two-fold: first, assist families to overcome their complex issues so subsequent children are not exposed to ongoing risk; second, to prevent subsequent children coming into families “while their parents are still addressing their complex issues” (Cram, 2012, p. 12). This project brief description implies that any reform designed to protect subsequent children was targeting parents who were already involved in active interventions with MVCOT. Since this project brief, the reform has taken a considerably more expansive jurisdiction with the enactment of section 18A. The review also acknowledged the disproportionality of Maori in the welfare system. Racial or ethnic disproportionality is defined as the underrepresentation or overrepresentation of a racial or ethnic group compared to its percentage in the total population (Dettlaff & Rycraft, 2010). Furthermore, Cram (2012) concluded that “Maori women are more likely to be vulnerable to intimate partner violence and other violence than non-Maori women” (p. 8). The review highlighted how cultural identity and participation under Article 2 of the Treaty is constitutionally protected. However, the
The review identified ongoing breaches of Article 2 as the ‘root cause’ of the disproportionality of Maori families in child protection. The review highlighted a significant research gap existed in the literature relating to

“the rehabilitation needs of Maori parents who have had a child removed and in particular; assistance provided to help cope with the grief associated with the removal” (Cram, 2012, p. 9).

Determining how section 18A potentially impacts upon Maori and their rights under the Treaty is therefore critical.

Cram (2012) observed that none of the literature canvassed could identify the needs of whanau who have had a child removed from their care. This chapter expands this observation to argue that the potentially significant psychological impact for subsequent parents who have had a child removed from their care and are automatically subject to a legal mechanism such as section 18A that raises an automatic presumption of harm is currently unknown. Current research relating to successive removals can be distinguished from subsequent parents under section 18A because unlike subsequent parents under section 18A, successive removals of other parents occur under the same legal mechanism.

Part two

Negative drivers

Responses to calls for reform are usually answered through legislative change (Chill, 2004; Humphreys et al., 2010). Throughout time, society has sought to address the problems posed by changing social, economic and political environments through legal mechanisms. Crime, poverty, alcohol and drug abuse, mental and physical health issues all contribute to the development of perceived social problems, such as child abuse, where the law is regarded as a social institution for achieving desired ends (Fortin, 1998). Considine (2005) describes the power relations that arise when legal mechanisms are used to ‘open the policy window’ in an attempt to address social problems. Considine (2005) argues if “power means the capacity to act, to have others act on your own behalf, and to influence behaviour in order to achieve a desired end, then policy is always an exercise and an artefact of power” (p. 41). This thesis argues that one characteristic of preventative legal mechanisms such as section 18A is that its
power can be used abusively to significantly abrogate the rights of those who are targeted by them.

Humphreys et al. (2010) specifically identifies ‘bad media’ as a ‘negative driver’ in the reform process. Distinctions between ‘good’ and ‘bad’ media are made in the literature. ‘Bad media’ is primarily media that is used in crime reporting. In this sense, ‘bad media’ can be seen as one response to a single incident of actual harm. In contrast, ‘good media’ can be characterised as an integral aspect of a primary-based maltreatment prevention strategy as it has demonstrated effectiveness when used as a population-based intervention method that promotes public awareness about child abuse and related issues. For example, in their study of population-based child abuse awareness campaigns in the Netherlands, Hoefnagels and Baartman (1997) found television media promoting child abuse awareness triggered population outreach to child abuse counselling hotlines and was effective in facilitating voluntary reporting of abuse.

‘Bad Media’

‘Bad media’ is identified as one significant external factor that potentially represents a detrimental influence in the reform process (Humphreys et al., 2010). Warner (2015) also argues the media is a critical driver in what she describes as ‘the politics of emotion’ where child protection reform is evoked by intense media scrutiny and public outcry following the serious harm or death of a child through extreme abuse or neglect. As a result, statistically rare incidences of serious physical child abuse leading to death, such as Nia Glassie and Cris and Cru Kahui, assume a hyperbolic effect to drive wide-sweeping reforms to child protection practice in New Zealand. This hyperbolic effect can also be explained by the fact that MVCOT maintains high levels of confidentiality; therefore, child abuse is only accessible to the media when reported in criminal jurisdictions. However, in recognition of the potential for media coverage to trigger ‘bad policy’, the Chief Social Worker, Dr Marie Connolly (2006), in a report to the Ministry of Social Development, highlighted the importance of ensuring single incidences of physical abuse are not given undue attention when instigating reform because child homicide in New Zealand is an extremely rare occurrence.

Warner (2015) argues that in New Zealand, child abuse has been constructed as a Maori problem “with a particular focus on Maori mothers and with explicit links to the welfare
benefit system” (p. 142). For example, the white paper estimates that “18 per cent of children born in 1993 spent at least nine years of their first 17 years supported by the benefit system” (MSD, 2012, p. 7). The juxtaposition of care with benefit statistics draws an implicit connection between children in care and beneficiaries. Beddoe (2014) argues that the focus of disgust in construction of the ‘vilified and folkloric bad Maori mother’ reflects colonial discourse about the disturbance of the ideals of a perfect nation.

Warner (2015) analysed the print media’s ritualised use of a “roll-call” of names of children who have died from abuse. Currently, in New Zealand, it is called the “61 dishonour roll” (New Zealand Herald, 2016). Warner (2015) argued that names that were recognisably Maori were more likely to be selected for inclusion. However, others argue that it is the level of violence and type of abuse that is perpetrated that attracts media reporting of child abuse (Hoefnagels & Baartman, 1997). As a result, physical abuse as opposed to cumulative neglect is more likely to be included in media reports of child abuse with the result that physical abuse takes on a hyperbolic effect. Widom et al. (2015) argue that cumulative neglect is responsible for a greater number of child fatalities than physical abuse. Likewise, Damashek, Nelson, and Bonner (2013) recommend that unique risk factors for neglect as opposed to physical abuse are important when developing preventative strategies. Despite this emerging research, extreme violence causing fatality as opposed to neglect is one key focus of the section 18A amendment.

**Part three**

**Origins of section 18A: The Green Paper**

The Green Paper for Vulnerable Children was published in August 2012. The purpose of the Green Paper was to

“...invite all New Zealanders to offer their ideas, opinions and experiences to find new ways to protect children better.” (Ministry of Social Development, 2011)
One consistent theme that emerged from ‘youth’ submissions is that an increase in ‘monitoring’ was suggested. When this population of submitters was asked, who should be monitored? They replied:

children or young people at risk (MSD, 2011, p. 8).

As a result of the reform, section 18A is one of the legal mechanisms enacted to specifically target risk. However, how this risk is identified is a key focus of this thesis. It is important to note that a significant proportion of the demographic of children represented in the report (i.e., 13 yrs – 24 yrs.) are arguably excluded from the definition of a subsequent child and therefore, the protective jurisdiction of section 18A.

In terms of legislative change, there was overwhelming support to

“Put children at the centre of every policy consideration.” (MSD, 2011, p. 13)

The Green Paper (2011) recommended that a greater emphasis upon the United Nations Convention on the Rights of the Child (UNCROC) was required in New Zealand child protection law. The Green Paper (2011) also recommended harsher consequences for maltreatment (MSD, 2011). What is clear is that section 18A adopts a ‘harsher’ or more ‘punitive’ approach for those with historical permanent removals.

Many submitters also believed that “culture is a universal human right” (MSD, 2011, p. 14). Furthermore, to meet the needs of vulnerable Maori children, “different pathways were necessary for these children” (MSD, 2011, p. 14). As outlined above, the potential challenges for Maori and how section 18A may potentially impact upon the principle of equity under the Treaty have been given focus in following chapters. The Crown’s ‘decisions’ that resulted from the submissions received under the Green Paper were communicated in the White Paper.

The White Paper

Following the Smith (2011) report, the White Paper for the VCB communicated parliament’s intention to “introduce a range of tough new measures aimed at abusers who are likely to continue to hurt children in the future” (MSD, 2012, para. 1). This

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16 Aged 13yrs – 24yrs
theme relating to the need for ‘harsher’ approaches to continued maltreatment that emerged from the Green Paper is further developed in the White Paper. Initially, these ‘tough new measures’ included the introduction of a civil child abuse protection order for serious abusers called Child Harm Protection Orders. The White Paper made it clear that the orders would be imposed on people who have been “convicted of, or found on the balance of probability to have committed, a specified offence against children” (MSD, 2012, para. 93). The objective of these orders was not to be punitive, but preventive. CHPOs would, among other things, place conditions where any “future children can be automatically referred to the family court at birth so that their care and protection needs can be determined” (MSD, 2012, para. 96).

To facilitate this approach, it was envisaged that the order would need to establish a presumption “that any future children of the person be removed, if the court is satisfied that the risk posed by the person justifies such a presumption” (MSD, 2012, para. 97). The proposed CHPOs attracted immediate controversy. The Auckland Law Society (2013) raised concerns around prospective legislation that exposed a person to a civil order based on the balance of probabilities; despite that person not having been convicted of a specified offence (Auckland Law Society, 2013, p1). The LAC (2013) expressed additional concerns. Despite the purpose of the proposed order was not to punish, but to protect, nevertheless, the LAC (2013) argued the orders had a punitive effect. For the LAC (2013),

...the rules governing criminal proceedings reflect the fact that, generally, one party has greater power than the other and the outcome of the proceedings may have a significant restriction of the rights of the party with the less power. (p. 2)

This observation from the LAC (2013) mirrors Considine’s (2010) argument above that policy is an exercise and an artefact of power. In the second reading of the Bill, Minister Bennett stated that the government would not be pursuing the child harm protection order mechanism as its preferred method to achieve its intention of protecting subsequent children from the harm of subsequent parents (Hansard, 15 April 2014 col 17264). However, in the suite of amendments introduced under the VCA, a completely

17 Clause 44(2)
new ‘assessment’ process was introduced under section 18A that achieved identical objectives as was proposed by the Child Harm Protection Orders Bill. Given the criticisms that the CHPO attracted during consultation, and in the interests of ensuring that “an appropriate balance between individual rights and the needs of the regime is achieved” (LAC, 2013, p. 3), this thesis examines section 18A in relation to International Covenants and domestic legislation, such as the NZBORA and the Treaty, to determine the potential interpretation and rights issues for subsequent parents and subsequent children.

The Human Rights Commission (2013) stated that:

“Clear robust risk assessment and oversight will be required to ensure that these orders successfully balance the human rights of children and the human rights of adults involved or affected”. (p. 11)

Although this comment was made in relation to CHPOs, this thesis argues the same due diligence needs to apply to the section 18A amendment given the identical parallels between CHPOs and the 18A amendment in terms of the specific individuals targeted and intent. When the VCB was receiving submissions, both the Auckland Law Society (2013) and the LAC (2013) were critical of the short time frame required for consultation. The first reading of the VCB was on the 17 September 2013 and submissions were requested by 30 October 2013. As a result, the Auckland Law Society (2013) stated:

...in the short time frame, we do not believe that it can give the Bill proper consideration. The broad nature of the proposals in the Bill creates risk of individual cases being predetermined and families being disrupted without due consideration being given to the rights of all involved. (p. 1)

Given the speed section 18A was enacted, any opportunity left for appropriate submissions relating to the proposed section 18A amendment was significantly limited due to the short time frame between its drafting and its enactment. Section 18A took force on 1 July 2016. Currently, section 18A is in its infancy. In future years, this jurisdiction may be expanded with additional amendments; for example, the categories

of parents of subsequent children may expand or the potential harm that is targeted may also expand. Ensuring that statutory social work theory and practice evolves as the use of legislative mechanisms such as section 18A evolves will be important moving forward. The remainder of this thesis takes the first theoretical step.

**Vulnerable Children Act 2014**

The VCA outlines the government’s priorities for vulnerable children as—

(a) protecting them from abuse and neglect:

To help achieve this objective, legislature created a new child protection assessment process within the CYFA1989 that applies to two separately identifiable groups of ‘parents’ that Parliament presumes to represent a serious risk of potential harm to their subsequent children.

**CONCLUSION**

The reform that drove the enactment of the Vulnerable Children’s Act 2014 was primarily influenced by what Humphreys et al. (2010) describes as ‘dynamic factors’ and ‘negative drivers’, the dynamic factors being instrumental in stage one of the framework as they identify the theoretical rationale that underpins section 18A’s enactment. The ‘refocusing debate’ is a critical aspect of the underlying rationale as it provides support for the perspective that a legal mechanism can be enacted to address the risk of potential as opposed to actual harm. However, Warner (2014) argues that the section 18A amendment is also contextualised by ‘emotional politics’, where the stigma towards abusive parents generates a need to punish rather than protect vulnerable families. Practitioners are therefore caught in the crossfire in making professional decisions under a mechanism that contains inherently contradictory motives and intention.
Chapter 7: Stage two – describing the presumption raised in relation to section 18A

As outlined in chapter three, section 18A raises an automatic presumption that a parent under section 18B(1)(a) and (b) represents a high risk of potential serious harm to subsequent children in their care. A presumption is a ‘legal inference’ drawn from the known or proved existence of some other fact. Section 18A raises an automatic presumption that a parent under section 18B(1)(a) and (b) represents a high risk of potential serious harm to subsequent children in their care due to their criminal past or previous statutory removal history.

Comparison between sections 15, 17 and section 18A

Ordinarily, MVCOT obtains the jurisdiction to become involved in the lives of New Zealand families through an adjudicatory process that is triggered by a notification or a report of concern. However, as highlighted in chapter three, under a section 18A assessment, a reverse onus of proof applies because a statutory presumption is made because of the two populations of parents that are identified under section 18B(1)(a) and (b) represent a potential risk of causing serious harm to subsequent children in their care.

Notifications can be made by anyone, either individuals or professionals who come into contact with the family. Section 15 states:

Reporting of ill-treatment or neglect of child or young person

Any person who believes that any child or young person has been, or is likely to be, harmed (whether physically, emotionally, or sexually), ill-treated, abused, neglected, or deprived may report the matter to a social worker or a constable.

The White Paper made it clear that the move towards mandatory reporting was not on Parliament’s agenda as there were concerns around the increase rate of notifications that mandatory reporting would introduce. However, VCA introduced mandatory child
protection policies that identify when an agency is required to make a notification to MVCOT if it believes a child is at risk of abuse or neglect.

Section 17 outlines the adjudicatory process involved in an investigation. In terms of administrative law, the ‘adjudicatory process’ by an administrative agency (such as MVCOT) describes a process whereby the agency is conducting an ‘investigation’\(^\text{19}\) to make a determination that may affect the rights and obligations of the parties involved (Chill, 2004). Section 17 initiates this adjudicatory phase. It states:

**Investigation of report of ill-treatment or neglect of child or young person**

1. Where any social worker or constable receives a report pursuant to section 15 relating to a child or young person, that social worker or constable shall, as soon as practicable after receiving the report, undertake or arrange for the undertaking of such investigation as may be necessary or desirable into the matters contained in the report and shall, as soon as practicable after the investigation has commenced, consult with a care and protection resource panel in relation to the investigation.

2. Where, after an investigation under subsection (1) into the matters contained in a report under section 15, the social worker or constable to whom the report was made reasonably believes that the child or young person to whom the report relates is in need of care or protection, that social worker or constable shall, as soon as practicable, notify a care and protection co-ordinator of those matters in accordance with section 18.

3. Where any person receives a report pursuant to section 15 relating to a child or young person, that person shall, as soon as practicable after—

   (a) that report is investigated under subsection (1); or
   
   (b) a decision is made not to investigate the report,—

unless it is impracticable or undesirable to do so, inform the person who made the report whether or not the report has been investigated and, if so, whether any further action has been taken with respect to it.

Once notifications are investigated, pathways other than statutory involvement may be implemented, such as differential/partnered response or a family/whanau agreement. However, as the section 17 outlines, if a social worker formulates the belief that a child needs care and protection, there is a mandatory requirement for the social worker to make a referral to a care and protection coordinator who will then convene a FGC.

\(^\text{19}\) Section 15 states that this process involves an investigation.
However, two things are clear. First, a notification is required before a section 17 process is initiated. Second, a statutory social worker has the evidential burden, based upon actual harm, to prove if a child or young person needs care and protection.

Family Group Conference

Under section 17, a FGC must be held once a care and protection social worker formulates the belief that the child needs care and protection. This phase is important in relation to both legal and social work practice. In terms of legal practice, establishing the jurisdiction of a FGC become important.

Section 37 states:

Proceedings of family group conference privileged

(1) No evidence shall be admissible in any court, or before any person acting judicially, of any information, statement, or admission disclosed or made in the course of a family group conference.

(2) Nothing in subsection (1) applies to a record made by a care and protection co-ordinator under section 29(3).

The term disposition refers to a court’s final determination of a case or issue. Section 37 therefore provides the FGC process with the legal privileges that are usually associated with a court proceeding. It is therefore arguable that the FGC process is the beginning of the dispositional phase of an investigation process for two reasons. First, it has some of the associated privileges of a court proceeding. Second, the potential outcome of a completed FGC is a declaration that a child needs care and protection. Before MVCOT is able to take permanent custody of a child, this declaration is a prerequisite. However, pending the outcome of an investigation or an FGC, an additional dispositional phase can be implemented under section 78\textsuperscript{20} to secure the safety of the child during the initial adjudicatory phase. In more urgent situations, section 39 also provides for a place of safety warrant to be executed if the social worker believes that,

on reasonable grounds, that the child or young person has suffered, or is likely to suffer, ill-treatment, serious neglect, abuse, serious deprivation, or serious harm

\textsuperscript{20} Interim custody order
Section 18A Assessment process

However, under a section 18A process, the section 17 adjudicatory phase has been replaced with an ‘assessment’ as opposed to an ‘investigation’. It is therefore not immediately apparent whether a section 18A assessment is triggered by the usual ‘notification’ process under section 15. Subsequent parents are placed under an immediate presumption of harm and have the requisite evidential burden to demonstrate safety. This would indicate that all that is required is that the ‘subsequent parent’ would come to the attention of MVCOT in order to trigger a section 18A assessment. Consistent with the recommendation from the Smith (2011) report, Laming Report (2003), and the Independent Experts Forum on Child Abuse (2009), the reform process has implemented moves to facilitate greater information sharing between professionals, such as education, health and justice, who may come in contact with vulnerable families. In addition, the mandatory requirement for professional agencies to develop Child Abuse Reporting Policies all indicate that increased monitoring of these families may ensure that they may come to the ‘notice’ of MVCOT without a notification being raised. Whether this in itself is sufficient to trigger a section 18A assessment is unclear.

If we take the two extreme ends of a usual assessment process and compare it with the new process under section 18A, the potentially onerous implications behind a section 18A process are highlighted. Under the normal adjudicatory process, if a social worker, after completing a normal assessment, formulates the belief that a child is not in need of care or protection, the social worker has the jurisdiction to immediately end the intervention without leave of the court. However, in contrast, if a social worker formulates the belief removal is required, then this will involve the Family Court determining if the allegation or the notification that a child has been abused is ‘legally sufficient’ and ‘factually true’ (Chill, 2004, p. 543). In contrast, under an 18A assessment, a subsequent parent has the evidential burden to demonstrate safety. The author argues it is more accurate to describe a subsequent parent as having an evidential burden to demonstrate that harm will not occur in the future (i.e., proving a negative), when compared with that of a statutory social worker who is proving that harm has currently occurred (i.e., proving a positive). The difficulty with proving a negative in an evidential
sense has been debated in jurisprudence throughout the centuries. The disadvantage for a subsequent parent in meeting this burden is that “…it does not prove that the fact did not take place, but merely proves that the witness did not cognize it taking place” ("Proving a negative,"1895, p. 270).

Furthermore, under a section 18A assessment, even if the social worker formulates the view that a subsequent child is not in need of care or protection, this decision will require leave of the court to make the final confirmation. Therefore, not only is a subsequent parent not subject to the usual notification process, as outlined under section 15, but in addition, they have to demonstrate their parenting ability to both a social worker and the court even if a social worker formulates the view that they no longer represent a risk of potential harm to subsequent children in their care.

During a section 18A dispositional phase, the court will decide what remedy would be in the ‘child’s best interests.’ However, in stark contrast to the section 15 investigation process, any opportunity for family or whanau input that is ordinarily available has also been eliminated. Section 18A(6) states:

No family group conference need be held before any application referred to in subsection (4) is made to the Court and nothing is subsection 70 applies. Therefore, the only principle that is guiding the application of a section 18A assessment is the paramountcy principle under section 6. Principles relating to family participation for decision making and that endeavours need to be made to obtain the support of the family.

This approach is therefore a direct outcome of the recommendation from the Smith (2011) stated that all those involved in child safety, welfare and protection needed to “ensure a child-centred perspective that focuses on the child” (p. 93). It was Smith’s (2011) observation that all other considerations should be subordinate to the paramountcy principle as found in s 6 of the CYPF1989.

Without maintaining the FGC mechanism, any mandatory practical application of these family-centred principles are completely eliminated from any section 18A process. This

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21 Section 18C(1)(3)
22 This section states that no application for a declaration that a child is in need of care or protection can be made unless a family group conference has been held under this part in relation to the matter that forms the ground on which the application is made.
is especially if the outcome of the section 18A assessment involves seeking a declaration to apply section 67.23

Within the same suite of amendments taking force on the 1 July 2016, section 67(2) has been introduced. It states:

However, on an application under section 18A(4)(a) or 18D in relation to a person to whom section 18A applies, if the court is satisfied that subsequent child is in need of care or protection on the ground of section 14 (1)(ba) it must make the declaration unless it is satisfied that the person has demonstrated that he or she meets the requirements of section 18A(3).

This section therefore confirms that the declaration can occur without the input of a FGC. Given the reverse onus of proof that a section 18A assessment is being assessed under, it is not even clear whether a social worker has the flexibility to allow these inclusive family decision-making principles to guide decision making until final disposition in the Family Court.

23 Grounds for declaration that child or young person is in need of care or protection
Chapter 8: Stage three – professional implications for section 18A

Stage three of the framework begins by highlighting that one significant barrier in implementing a legal mechanism such as section 18A to address serious maltreatment stems from the fact that conceptually, child abuse escapes clear aetiology. Four decades of research have consistently been highly unequivocal in identifying a quintessential aetiology of child abuse. Throughout the decades, several reviews indicate a bewildering and often conflicting array of possible aetiological factors (Spinetta & Rigler 1972; Martin & Beezley, 1974; Starr, 1979; Schmitt, 1980; Garbarino, 1980; Vietze et al., 1982). Rigorously conducted research on the origins of abuse and neglect has been considerably scarcer than suppositions (Plotkln et al., 1981).

Child abuse is not a discrete social factor that a parent or caregiver clearly demonstrates; instead, it consists of an amorphous group of behaviours that, when manifested to a different degree, might be considered characteristic of abuse (Giovannoni & Becerra, 1979). Munro (2007) argues that developing a definition of abuse is made even more difficult because child abuse is often a socially constructed concept that changes over time. Booysen et al. (2007) observed that Western attempts at universalizing definitions of child abuse fail to consider the cultural and social realities of other places. Likewise, Gupta (2007) states “the professionalization of the care and protection of children in the West has resulted from a complex of particular events that reflect Western cultural beliefs about the self, subjective experience and interpersonal connections” (p. 63). Therefore, unlike the medical profession, child protection practitioners are faced with predicting the development of a problem whose very existence is often a matter of subjective interpretation because a clear, useful aetiology of the problem is neither known nor agreed. What is increasingly obvious is that a complex range of risk factors contributes to the causal pathway of child abuse (Munro, Taylor, & Bradbury-Jones, 2014).
Distinguishing characteristics of a section 18A assessment

Section 18A has several different characteristics that distinguishes it from mainstream child protection decision making for several reasons. These differences may represent other practice implications for the section 18A amendment. First, similar to the early colonisation protection statutes, a presumption is raised relating to potential, as opposed to actual, harm. This presumption requires a practitioner to assess *propensity evidence* driven by removal and criminal history, making *any* decision under section 18A inherently complex and uncertain. Given the presumption raised under section 18A is driven by the removal and criminal history of subsequent parents, whether historical information is an adequate proxy for predicting the current abuse of subsequent children is unequivocal at best. This is especially true given section 18A has used social factors, which can change dramatically over an individual's lifespan, to identify the two populations of parents to be targeted. Given the complexity is the decision making around section 18A, critics argue that this high level of uncertainty and complexity in decision making involves the operation of heuristic and bias, leading to issues around the reliability and validity of the decisions being made.

Second, section 18A targets two specific groups of parents with significantly different qualifying criteria. As outlined earlier, section 18B(1)(a) parents have historical convictions for causing the death of a child in their care. In contrast, section 18B(1)(b) parents have permanent removal history. The potentially stigmatising effect for those parents targeted under section 18A will be addressed. This chapter distinguishes between the two groups by categorising section 18B(1)(a) parents as being identified by criminal conviction data held by the Ministry of Justice and section 18B(1)(b) parents identified through Removal information held by MVCOT that is protected by privacy provisions. The distinguishing feature between the two is that the substantiation data used to identify subsequent parents under section 18B(1)(a) was not sourced from the same substantiation data used to identify subsequent parents under section 18B(1)(b). In addition, the decision-making process that created these two different sources of data is completely different, giving these two data sources

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24 The issues surrounding the use of propensity evidence for forensic purposes are fully addressed in chapter eight.
diverse characteristics. How this potentially impacts upon decision making will be briefly described.

The third difference is how ethical concerns impact upon the effectiveness of the preventative strategy enacted in section 18A.

Characteristics of decision making under uncertainty

Just like the protection statutes used during Australasian colonisation, section 18A identifies categories of parents who are presumed to represent a risk of harm to their children and implements a prevention-focused intervention. However, adopting such an approach has consistently raised controversy, given erroneous case decisions resulting from underlying discriminatory assumptions (Dettlaff & Rycraft, 2010; Buti, 2004), misleading data sets (Keddell, 2015), and evaluator subjectivity and bias (Herman, 2009; Munro, 2007). Erroneous, inadequate and discriminatory decision making has demonstrated the very real capacity to devastate lives (Kidd, 2000). As addressed above, the social outcomes for Aborigines following the implementation of the protection statutes during colonisation is a prime example. Everson and Sandoval (2011) observe progress in remedying this problem has been minimal since early warnings were sounded two decades ago (Corwin, 1987).

Explanations for clinical decision making in the face of uncertainty is offered by the dual process theory of reasoning advanced by Croskerry (2009) and Osman (2004). Enosh and Bayer-Topilsky (2015) indicate that decision making within the context of uncertainty involves a dual process between two cognitive systems. The first involves heuristic-intuitive reasoning (automatic processes); the second is controlled-analytical reasoning (rule-based processes). When faced with an incidence of actual harm under the substantive jurisdiction of the CYFA1989, that accompanies a corresponding high level of forensic value, practitioners are more likely to apply controlled-analytical reasoning in decision making (Herman, 2009). In all other circumstances that occur in situations of high uncertainty, such as decision making under section 18A, practitioners employ heuristic-intuitive reasoning methods during decision making (Kearney, 2013). Critics argue that decisions involving high uncertainty, such as those under section 18A, are more susceptible to personal
heuristics and biases such as cultural differences and professional or organisational culture.

Keddell (2015) attributes decision-making variability within child protection contexts to macro-level factors such as ‘hyper surveillance’; meso-level factors such as ‘site specific cultures’; and micro-level factors such as individual practitioner bias. Widom et al. (2015) in their study relating to intergenerational abuse found support for the operation of surveillance bias. In this study, parents with documented histories of childhood abuse and neglect were two and a half times more likely to have a child protection report of concern than comparison parents. In their study, Reilly et al. (2013) found that socio-economically advantaged women in Australia were least likely to receive psychosocial screening for depression, domestic violence or abuse during both pregnancy and during the one year perinatal follow-up period, women from lower socio-economic groups therefore attracting greater screening-associated surveillance.

Bias and Heuristics

Herman (2009) has emerged as a leading critic of current decision-making practices arguing that professional judgements lack reliability and validity. Everson and Sandoval (2011) provided support for Herman’s (2009) criticism of the limited reliability of professional judgements. Furthermore, Herman (2009) raises serious questions about the legitimacy of decision making in child protection contexts without corroborating evidence. However, for Herman (2009), ‘evidence’ is defined narrowly to include only evidence with high forensic value, such as perpetrator confessions, medical and photographic evidence. This criticism is particularly cogent in relation to a section 18A assessment, given the evidence relied on to make a decision under a section 18A assessment is characterised as ‘propensity evidence’ driven by removal and criminal history.

Variability in forensic decision making

Everson and Sandoval (2011) adopted the epidemiological concepts of ‘sensitivity’ and ‘specificity’ to explain the differing professional attitudes of medical and legal professionals in regard to child sexual abuse allegations. They expanded the model to develop a tripartite test of forensic attitudes: sensitivity, specificity and scepticism.
Surprisingly, Everson and Sandoval (2011) found that in relation to sexual abuse allegations, child protection practitioners reflected elevated levels of scepticism that would ordinarily be associated with professionals that were “dis-believing of sexual abuse allegations” (p. 296). Everson and Sandoval (2011) observed this finding contrasted previous research when child protection practitioner ratings for scepticism were extremely low, indicating that professional scepticism can change over time. This finding from Everson and Sandoval (2011) is relevant to a section 18A assessment because of the mandatory requirement for its conclusion by disposition in the Family Court where social worker professional attitudes might significantly differ from those of the judiciary. In addition, given the presumption raised by section 18A places the burden of proof upon the subsequent parent, the potential for practitioners to develop elevated levels of scepticism around the evidence that subsequent parents provide to rebut the presumption may require future research.

This is consistent with previous findings from Chill (2004) who observed that decisions made based upon individual professional judgement and definitions of maltreatment can differ from the legal perspective. For Everson and Sandoval (2011), their observations relating to high levels of attitudes may bias a professional’s view of a case, even sight unseen. For Richards, Smith, Fogel, and Bjerregaard (2015), ‘professional groupings’ rather than individual factors determined the types of information that was used in decision making. In addition, they identified the operation of the ‘best interest of the child’ as the legal rationale that guides professional decision making in child welfare cases. This is especially true when decisions relating to whether removal or family preservation is being considered.

Decision making variability around types of harm

Section 18A targets two groups of subsequent parents and three types of harm.25 The first group of subsequent parents are described as those who have convictions for infanticide, murder, or the manslaughter of children in their care. Damashek and Bonner (2010) distinguished between fatalities that are caused through an act of commission, for example, physical assault or an act of violence and an act of omission.

25 Chapters 11 & 12 provide the reader with an extensive analysis of the two groups of subsequent parents that are targeted by the amendment.
for example, fatality caused by neglect. It is not clear whether fatalities that are caused by ‘neglect’ are included within the section 18B(1)(a) group of parents of subsequent children. Section 18B(1)(b) subsequent parents are substantially wider than section 18B(1)(b) subsequent parents as the focus is not just upon physical abuse but includes emotional, sexual abuse26 and neglect.27 It is immediately clear that section 18A is distinguishing between victims of child abuse who have died and victims who have survived. As a result, recent research indicates a wide variability in professional decision making can result when these types of distinctions are made (Damashek & Bonner 2010; Damashek et al., 2013; Widom et al., 2015).

Damashek et al. (2013) found that fatalities caused by ‘physical assault’ were perceived to represent a greater risk of harm to siblings than fatalities caused by neglect. This is despite evidence that more child fatalities are caused by neglect than physical violence. As a result, surviving siblings from physical assaults were five times more likely to be removed than surviving siblings of neglect-related fatalities (Damashek & Bonner 2010). Widom et al. (2015) stated that “individuals with histories of child maltreatment were not at increased risk to physically abuse their children” (p. 1481). The immediate implication for the implementation of section 18A is that decision making between the two sets of parents may be more prejudicial against subsequent parents under section 18B(1)(a) than section 18B(1)(b). This reinforces earlier arguments around practitioner decision making and propensity evidence. This is particularly true given the highly stigmatising effect that a criminal conviction for causing the death of a child represents (Warner, 2015). This potential problem is accentuated, given a section 18A assessment needs to progress through two separate and distinct decision-making processes and therefore, two separate professional groupings (i.e., statutory social worker assessment and disposition at the Family Court).

For example, in the first part of the process, a social worker formulates a view whether a confirmation or a declaration is going to apply. However, this ‘view’ then requires disposition in the Family Court. As outlined above, each of these professional groupings have attitudes and bias that interprets information and evidence differently. For

26 Section 14(1)(a)
27 Section 14(1)(b)
example, parents identified under section 18B(1)(a) have been found beyond a reasonable doubt to have committed abuse against a child that resulted in a fatality. This is in contrast with subsequent parents under section 18B(1)(b) who have been found on the balance of probability to have harmed children in their care. Whether parents under section 18B(1)(a) therefore require greater evidence to be able to have subsequent children in their care will be determined by the professional grouping that is assessing the evidence. Furthermore, Widom et al. (2015) observe that the effective assessments of abuse across generations “depend on the source of the information used to assess maltreatment” (p. 1484). However, as the following analysis will demonstrate, the use of information in substantiation data and through information-sharing agreements, is not without its difficulties, especially in relation to the ethical conflicts that it creates for the entire professional community as a whole.

Decision making and the ‘sequentiality’ effect

Chill (2004) refers to the ‘snowball effect’ associated with care or court protection proceedings. For example, when a place of safety warrant is executed, children are taken into ‘custody.’ Under the warrant, children are detained for their immediate safety. The CE will proceed to file an affidavit applying for orders under the suite of orders that are available under the CYFA1989. These were outlined in chapter 9.

At disposition, it is important to highlight that a child progresses from a being in ‘custody’ to going into ‘care’. The focus of the court proceedings therefore undertakes a subtle shift from “whether a child should be removed to should a child be returned?” (Chill, 2004, p. 542). It is at this stage, the burden of proof shifts to the parents. However, under a section 18A assessment, the parents have an automatic onus of proof – the preliminary onus has already been assumed. Section 18A effectively takes the two-step process outlined in chapter 7 and reduces it to one.

Chill (2004) argues that in any dispositional phase, practitioner decision making becomes self-reinforcing. For example, substantiation data informs the social work knowledge base that parents with previous removals or convictions for causing the death of children in their care represent an increased risk of potential harm to subsequent children in their care. Removing subsequent children may therefore be regarded as critical for their overall psychological, and cognitive, wellbeing. The
The underlying rationale is that the longer a subsequent child spends with a subsequent parent, the higher the probability that a subsequent child will suffer a serious maltreatment or abuse and the more self-reinforcing the decision to implement a removal strategy. Chill (2004) refers to this as the ‘sequentiality effect.’ This effect can be observed when the dispositional stages of an assessment process become circumvented to such an extent the outcome becomes predetermining. This deprives the dispositional stage of due process, which is at its essence, its fundamental constitutional function (Chill, 2004). By introducing an automatic reverse onus of proof for a specific separately identifiable group, Parliament is introducing a process that significantly limits due process. Chill (2004) highlights that the second factor that amplifies the ‘sequentiality effect’ in child protection cases is the decrease in the Crown’s substantive burden of proof at dispositional hearings when a parent assumes the onus of proof to demonstrate safety. Chill (2004) was making his observation in relation to decision making that occurs under a usual section 17 investigation process. As outlined above, under a section 18A assessment, that onus of proof is placed upon a subsequent parent at the start of the assessment process. This observation from Chill (2004) represents a potentially significant challenge for the fair and equitable implementation of section 18A’s process.

Chill’s (2004) ‘sequentiality effect’ was clearly used when describing individual practitioner decision making over the course of one intervention. This chapter expands Chill’s (2004) effect to include professional decision making around clients, such as the parents identified under section 18B(1)(b), who have had multiple removals. In this context, the sequentiality effect’ may operate to characterise decision making from an organisational perspective, that is, as the organisation has implemented previous removals; therefore, historical decision making becomes potentially self-reinforcing. This potential challenge is further accentuated by the binary decision-making mechanism where either a 'confirmation' or a 'declaration' is the outcome. The whole process will be overseen by a care and protection social worker who, depending upon their predilection for defensive practice, may make decisions based upon historical organisational trends. As outlined above, a practitioner’s predilection for defensive practice can be motivated by many factors.
Issues relating to professional Ethics

Feng, Chen, Fetzer, Feng, and Lin (2012) succinctly summarised the ethical issues around child abuse decision making as an intricate tripartite corollary involving harm to the child, harm to the professional and harm to a third party (e.g., families, alleged perpetrators etc.). Feng et al. (2012) argues that this tripartite relationship creates an ethical paradox that health professionals reconcile by adopting a ‘don’t ask don’t tell’ strategy, for example, health professionals will avoid abuse-related questions during routine psychosocial or health-screening assessments for fear that the response places them in the dilemma of having to report patients to child protection services. Likewise, Read (2007) noted that psychiatrists and mental health workers in New Zealand consistently adopted this strategy to reconcile the associated ethical paradox that reporting child abuse generates. This low level of abuse inquiry by mental health staff in New Zealand is consistent with the results of similar studies elsewhere (Muenzenmaier et al., 2015). However, as outlined in chapter 6, the usual notification process is significantly different under section 18A than the substantive jurisdiction of CYFA1989. Effective implementation of section 18A from a practice perspective will require significant collaboration and information sharing with other professionals involved with vulnerable families, which accentuates the ethical issues outlined above.

Privacy and information sharing

In their study, Marsh, Browne, Taylor, and Davis (2015) addressed the ethical conflict for midwives in New South Wales following a recent development in child protection practice called ‘assumption of care’, resulting in the removal of babies from their mothers at birth. In their study, Marsh et al. (2015) translate the term “midwife” as ‘with woman’, thereby highlighting “the midwifery philosophy which aligns midwives with women first and foremost” (p. 68). Significant difficulties therefore arise when this approach conflicts with child welfare agencies and their statutory obligation to focus upon the ‘best interests of the child’. This chapter argues that midwives in New Zealand, since the enactment of section 18A, will be increasingly placed in what Marsh et al. (2015) describe as ‘cognitive dissonance.’ Cognitive dissonance occurs when “an individual must accommodate two contradictory beliefs, ideas or values at the same time” (p. 69). Based upon Festinger’s (1985) seminal work, dissonance occurs when the conflicting values are unable to be reconciled leading to feelings of anxiety, stress anger
and sadness. The difficulties observed by Marsh et al. (2015) is addressed in a recent study by Haultain, Fouche, Frost, and Moodley (2016) who support increasing calls for a move away from what they describe as a binary either/or position of adopting a ‘child-centred’ or a ‘woman’s-centred’ approach towards a dual orientation approach. This dual orientation is supported by a growing body of research (Featherstone et al. 2014, Gould & Baldwin, 2006, Laing & Humphreys, 2013, Lonne et al., 2009).

Crucially, Marsh et al. (2015) have indicated that the implementation of section 18A leads to increased surveillance and may result in women with new-born babies avoiding antenatal care for fear of statutory interventions. Legal mechanisms such as section 18A therefore represent a potential direct barrier to the successful implementation of critical secondary health prevention strategies. Laing (2016) indicates this ‘fear’ is a particularly significant barrier to antenatal care for Aboriginal women in Australia. In New Zealand, midwives will be increasingly placed in this position because a section 18A assessment is triggered without a notification being raised, unlike the substantive jurisdiction of CYFA1989 that can only be triggered by a report of concern. Information sharing between agencies such as education, justice, health providers and the MVCOT is critical for the jurisdiction under section 18A to be activated. Therefore, all professionals who have what Feng et al. (2012) describe as a “close relationship with families” (p. 277) will be affected.

Howe (2010) is particularly critical of information sharing and its potential to impede rapport and the development of functional working relationships. Munro (2007) notes that information sharing too quickly can lead to excessive intrusive interventions. In their study, Feng et al. (2012) surveyed professionals in relation to reporting attitudes and found ‘time frames’ was a consistent theme that professionals observed as representing an ethical challenge as they are often unrealistic, create anxiety and foster dangerous decision-making environments as decisions are made quickly with incomplete or inaccurate information. Section 18A remain silent on either the time frame that is required for both the completion of an assessment and final disposition. More research relating to the time frames involved in completing a section 18A process is therefore recommended in the future to save subsequent parents from unnecessarily protracted assessments which can lengthen unnecessary feelings of fear and anxiety they may experience having already being targeted under the amendment.
Chapter 9: Stage three – identifying the legal interpretation issues – an overview

Chapter nine continues stage three’s analysis by adopting a general overview of section 18A to highlight potential interpretation issues raised by the four criteria necessary to trigger a section 18A assessment. This is in contrast to the remaining chapters that will address specific interpretation issues relating to the inclusion of unborn children within the definition of subsequent child and the two population of parents under sections 18B(1)(a) and 18B(1)(b). Through this chapter’s analysis, it is immediately apparent that the language used in the drafting of section 18A, and all its associated requirements is at times, potentially problematic. Problems in drafting at an enactment level can only represent significant challenges for implementing section 18A on a practice level.

The first challenge in implementing section 18A from a legal perspective involves addressing whether it was Parliament’s intention to develop an entirely new class of ‘parent’ or ‘child’ for the purpose of an 18A assessment, or alternatively, to incorporate the existing definition of ‘child’ and ‘parent’ within the amended definition of ‘subsequent child’ and the introduction of a ‘parent of a subsequent child’ concept. Depending upon the interpretational approach that is adopted, section 18A’s jurisdiction is either hugely expanded or limited. To make this interpretation task even more difficult, Parliament has specifically introduced a definition of subsequent child into section 2 following the 1 July 2016 amendment, without a corresponding definition of parent of subsequent child.

When comparing the CYFA1989 definition of a ‘subsequent child’ and a ‘child’, it becomes obvious that the amended definition of a ‘subsequent child’ is more expansive than the current definition of a ‘child’ as it includes a child born or unborn. However, its jurisdiction is also restricted as the definition of subsequent child does not include a

28 Sections 18B(1)(a) & (b), 18C and 18D
29 The Interpretation section of the CYFA1989
young person within the definition, signalling a parliamentary intent that the protection under section 18A is for a child only.

CYFA1989 defines young person as follows:

young person means a boy or girl of or over the age of 14 years but under 17 years; but does not include any person who is or has been married or in a civil union.

Given it is possible for children over the age of 14 years old to be in the care and custody of the CE, this therefore raises the question as to whether this population of vulnerable children (i.e., over the age of 14 years old but under the age of 17 years old) is excluded from the additional preventative protections offered under section 18A. Potential rights issues are therefore raised as young people are being discriminated against due to their age.

To be categorised as the ‘parent of a subsequent child’, under section 18B(1)(a), a subsequent parent needed to have caused the death of a child or young person. However, the term young person is not used in the Crimes Act 1961 for the offences identified under section 18B(1)(a). If section 18A is proving protection for a specific age range (0–14 years), then including young persons as a criterion for being classified as a subsequent parent would appear to be an unnecessary extension of the concept given the intent of section 18A is to prevent the risk of serious abuse to a child only. It therefore leads to the situation where a person who has been convicted of an offence for causing the death of a 15-year-old is classified as a subsequent parent, but could still have the full-time care of a 15-year-old without triggering a section 18A assessment.

Unlike the definition of ‘subsequent child’ in section 2, the amendment does not introduce a new definition of the term ‘subsequent parent’. Instead, section 18B(1)(a) and (b) describe a set of characteristics that could ‘identify’ a group of subsequent parents at any given time. This allows Parliament the flexibility to easily expand the population of subsequent parents in future amendments. For example, another population of subsequent parent could be included by targeting those convicted of sexual offences against children. Alternatively, future amendments could incorporate the definition of ‘young persons’ within the definition of subsequent child.
Drafting Challenges

Section 18A(1)(b)

Before looking at the specific characteristics of each group of subsequent parents identified in section 18B, this part of the chapter focuses upon section 18A (1)(b), one of the four criteria required to trigger a section 18A assessment.

As outlined above, section 18A(1)(b) uses the term ‘parent’, not subsequent parent. The current definition of a parent contained within the interpretation section of CYFA1989 is the following:

*A parent in relation to a child includes a step-parent of a child, but only if the step parent shares responsibility for the day to day care of a child with a parent of a child.*

Although CYFA1989 provides a definition of ‘parent’; it does not go far enough to achieve legislative clarity. If the term parent in section 18A(1)(b) is to be interpreted with reference to the existing definition of ‘parent’ in the CYFA1989, immediate limitations are introduced into the ‘subsequent parent’ concept. For example, although the definition of parent is expanded to include a ‘step-parent;’ they are only included within the definition if they “…share responsibility for the day-to-day care of the child with the parent”. This allows a step-parent to argue that they do not share ‘day-to-day care’; therefore, section 18A does not apply to them. It was at this point that Parliament could have stated: *is the subsequent parent of a subsequent child*, and then introduced a definition of ‘subsequent parent’ into section 2 that included informal care arrangements to achieve legislative clarity. This is especially true given the preventative intent Parliament was trying to achieve by the section 18A amendment. For example, as stated in the White paper and Hansard, in certain cases, the wider whanau represented just as much of a risk of harm to children as their ‘biological’ parents. However, this was not done; therefore, the issue of whether the term ‘parent’ that is used in section 18A(1)(b) is to be interpreted in reference to the definition of ‘parent’ that is currently in section 2 of the CYFA1989. If the recent tragedy around Moko Rangitoheriri (“baby Moko”), is considered, the interpretation of section 18A(1)(b) becomes critical.
Tania Shailer and her partner, David William Haerewa, were sentenced on the 27 June 2016 to 17 years with a minimum of nine years in jail for baby Moko’s manslaughter in August 2015. The original murder charges were dropped and replaced with manslaughter. This is the longest sentence given for the manslaughter of a child. Shailer and Haerewa were supposed to be looking after baby Moko while mother Nicola Dally-Paki was at Starship Hospital caring for one of her other children. Although the manslaughter charge would still satisfy the requirement for section 18B(1)(a), the characteristics for a subsequent parent under 18A(1)(a-d) also need to be met. If the above restricted approach were adopted, this particular situation would not be caught by the Act as neither Shailer nor Haerewa were baby Moko’s biological parents, nor were they baby Moko’s step-parents. Therefore, the intention of the amendments to be ‘preventative’ would be circumvented if a restricted interpretation were adopted.

Furthermore, when applying section 18A upon either Haerewa’s or Shailer’s release, a section 18A assessment may be triggered in relation to their own children. However, if a restricted interpretation approach was adopted to the definition of parent under section 18B(1)(b), then arguably, they could have care of other children without an 18A process being triggered. This would therefore seem to be an absurdity given the intention of the CYFA1989 and the presumption that this group of people are unable to care for any child; it is not just restricted to their own biological children or to step-children. The interpretation issue whether a restricted or expansive view of a ‘subsequent parent’ become even more ambiguous when section 18B(1)(b) is read in juxtaposition with section 18A(1)(c).

Section 18A(1)(c) states—

“has, or is likely to have, the care or custody of the subsequent child.”

When looking at section 18A(1)(c), it includes persons who have ‘care or custody’. The next interpretation issue is therefore determining whether the term ‘care’ is coloured by the term ‘custody’.

Custody is defined in the CYFA1989 as—

“the right to possession and care of a child or young person.”
In *Hewer v Bryant*[^30], Fox LJ considered what custody involved. In dicta, the Lord Justice observed the central element for custody was control. Lord Scarman observed that “it starts with the right of control and ends with little more than advice”.

The term ‘care’ is not defined in the CYFA1989. Given that the term ‘care’ is included within the definition of custody, determining whether the definition of custody colours the definition of care will either restrict or expand the definition of ‘care’. This interpretation difficulty becomes even more complicated when comparing the definition of custody with section 18A(1)(c). In the definition of custody; ‘care’ is a definitional requirement of custody. In contrast, section 18A(1)(c) implies that care is a separate concept as it refers to ‘care’ or ‘custody’. The main implication is determining whether this separate concept of care under section 18A (1)(c) includes informal care agreements. The implication for this interpretation becomes obvious if we consider the case of Nia Glassie, specifically referred to in the Smith (2011) report. It cannot be said that those convicted of her murder had ‘custody’ of her at the time of her death, as they had no legal or natural right of possession. However, they would be caught by section 18A if the term ‘care’ was interpreted to include informal care arrangements.

It is ironic that the case involving M that was the subject of the Smith (2011) inquiry, which informed the VCA to drive the 1 July 2016 amendments, would not be caught by section 18A irrespective of what interpretation were adopted. For example, M survived her abuse therefore section 18B(1)(a) would not apply. Second, at the time of the abuse, she had been returned to her mother’s care. Therefore, the requirement under section 18B(1)(b) is not satisfied as it cannot be said that “there is no realistic prospect that the child or young person would be returning to her care”. As a result, Parliament’s intention following the Mel Smith (2011) report to protect children such as M would fail.

Above, three separate, well publicised, child fatality and serious abuse cases were outlined that would not be caught by an 18A process if a restricted interpretative view of a ‘subsequent parent’ were to apply. This is because this restricted view does not cover scenarios where biological parents have informally delegated their parental rights.

[^30]: [1970] 1 QB 357
to persons other than their partners. Clearly, it is Parliament's intention that such cases as the ones outlined above are caught by this provision (Smith, 2011). It is therefore necessary to explore other legal principles to assist in the development of a new conceptual parent (e.g., a subsequent parent), which is more expansive than the existing view of ‘parent’, to give effect to Parliament’s intentions to prevent the risk of potential harm by subsequent parents who have delegated their parental obligations, which has resulted in serious child maltreatment or fatality.

In loco parentis

The term *in loco parentis*, refers to the legal responsibility of a person or organization to take on some of the functions and responsibilities of a parent. It applies where a person has put himself/herself in the situation of a lawful ‘parent’ by assuming parental obligations without going through the formalities of legal adoption. It embodies the two ideas of assuming parental status and discharging parental duties (Pedagno, 2011, p. 190). Originally derived from English common law, it allows institutions such as colleges and schools to act in the best interests of the students as they see fit. In addition, this doctrine can provide a non-biological parent with the legal rights and responsibilities of a biological parent if they have held themselves out as the parent.

This common law principle has been codified in the Crimes Act 1961.\(^{31}\) Section 152 states—

Everyone who is a parent, or is a person in place of a parent, who has actual care or charge of a child under the age of 18 years is under a legal duty—

(a) to provide that child with necessaries; and
(b) to take reasonable steps to protect that child from injury.

From section 152, it places parental obligations on *a person in place of a parent who has actual care*. In dicta, the CA in *R v Lunt & Ors*\(^ {32}\) addressed the common-law position of *in loco parentis* and its applicability in New Zealand.

\(^{31}\) *R v Roman Catholic Archdiocese of Wellington* [2008]
Mr Wharehinga and Ms Lunt were in a relationship. Ms Small and her daughter Iris were living with them in the same household. Mr Wharehinga and Ms Lunt had expressed concerns about Ms Small’s ability to care for Iris. Over a subsequent period of some weeks, Iris suffered a series of injuries. However, during the night of the 17th–18th October 2002, Iris received a fatal head injury. There was no dispute that this fatal injury was effected by Ms Small. However, the Crown also argued Mr Wharehinga and Ms Lunt were criminally responsible for her death because at the relevant time they were exercising custody and control over Iris. As such, they had charge of her jointly with Ms Small and had failed in their legal duty to protect Iris. When addressing whether Mr Wharehinga and Ms Lunt had a common-law duty, the CA were unable to express a concluded view. In delivering the decision of the CA, Blanchard J stated

“...we heard no argument on whether at common law a parental duty is imposed upon someone in loco parentis. We are inclined to think that the common-law duty does so extend ...we prefer not to express a concluded view” [para. 28].

In McCallion v Dodd33 Turner and McCarthy JJ held at the foundation

“...however, the younger the child, the stronger a parental right (and the requisite obligation). Strong parental rights are required at an early age because parental rights exist for the protection of the child and it was for the child’s benefit that the parent’s rights of control existed (Gillick34).

In Iris’s case, McCallion v Dodds would indicate that owing to her infancy, the associated parental rights impose a higher level of obligation than that of older children. However, the added corollary is that the recognition of parental rights will potentially be ‘stronger’ when a child is an infant or a young child. The above dicta suggesting that parental rights dilute as a child ages. What is clear from CA in R v Lunt & Ors is that the CA are unable to reach a conclusive view as to whether informal care arrangements attract the obligations ordinarily attached to parents. Therefore, one way section 18A could have addressed concerns raised by the Smith (2011) in relation to fatalities such

33 [1966] NZLR 710
34 [1985] 1 All ER 533
as Nia Glassie and Baby Moko is to incorporate reference to section 152 of the Crimes Act 1961 within the definition of 'parent of a subsequent child'. This would enable informal care arrangements (i.e., a person in place of a parent who has actual care) to come within its protective jurisdiction. Furthermore, if only the definition of subsequent child were to incorporate reference to s 152, the remaining substantive jurisdiction of the CYFA1989 would be excluded thereby avoiding issues relating to the floodgates argument.35 Future research around the risk posed by informal care arrangements by caregivers other than biological or step-parents is therefore needed, and whether these arrangements should be included within the definition of 'parent of subsequent child'.

Role of social worker under section 18A(2)

The decision making for a child protection social worker under section 18A is vastly different to the decision-making requirements under the substantive jurisdiction of CYFA1989.

Section 18A (2) states:

If the chief executive believes on reasonable grounds that a person is a person to whom this section applies, the chief executive must, after informing the person (where practicable) that he or she is to be assessed under this section, assess whether the person meets the requirements of subsection (3) in respect of the subsequent child.

Section 18A (2) makes it clear that a social worker is immediately conducting an assessment as opposed to an investigation. Section 18A(2) also makes it clear that a social worker ‘must’36 inform the person that they are to be assessed. The amendment is therefore being directive about practice around initial client engagement.

Section 18A(4) states:

Following the assessment, —
(a) if subsection (5) applies, the chief executive must apply for a declaration under section 67 that the subsequent child is in need of care or protection on the ground in section 14(1)(ba); or

35 If obligations were extended this would result in a much higher work load for statutory social work.
36 This is a mandatory requirement
(b) in any other case, the chief executive must decide not to apply as described in paragraph (a), and must instead apply under section 18C for confirmation of the decision not to apply under section 67.

This section places a statutory social worker under a mandatory duty to exercise dichotomous decision making (i.e., can only decide to apply to the Family Court for a confirmation or a declaration). In either case, the Family Court makes the ultimate decision at disposition. The court can only be as effective as the social worker given the social worker has the statutory obligation to place all relevant information before the court. However, as the burden of proof rests with the subsequent parent, the social worker has no statutory responsibility for the quality of information that is provided.

Given the parents that are being targeted are likely to be involved in highly complex family dynamics, this obligation represents one potentially significant challenge for the effective implementation of the amendment. Decision making under section 18A is also complex given the type of evidence that the amendment is requiring a social worker to assess.

Subsection (3) states:

A person meets the requirements of this subsection if—
(a) in a case where the parents own act or omission led to him or her being a person described in Section 18B, the person is unlikely to inflict on the subsequent child the kind of harm that led to the parent being so described; or
(b) in any case, the parents is unlikely to allow the kind of harm that led to the parent being a person described in Section 18B to be inflicted on the subsequent child

Section 18A 3(a) and (b), with its emphasis upon unlikely, indicates that the rules around propensity evidence are a significant feature of an 18A process. Therefore, a section 18A assessment also places a social worker under a mandatory obligation to make an assessment about the current veracity of propensity evidence. There are two categories of propensity evidence, both of which are the defining characteristics of the two categories of subsequent parents under section 18B(1)(a) & (b): uncharged prior
bad acts,\textsuperscript{37} and prior convictions.\textsuperscript{38} It is well recognised in jurisprudence that the use of propensity evidence or similar fact evidence is highly litigious given the significant risk of prejudice that it can represent (Mann & Blunden, 2010). This means that a statutory social work practice under section 18A is likely to be legally contentious and potentially exposes a social worker's decision-making process to an increased risk of legal challenge.

In \textit{R v Bull}\textsuperscript{39} the CA stated that illegitimate evidence is whether

\begin{quote}
"...the evidence in question is more probative than prejudicial. The word 'prejudicial' in this context means prejudicial in an illegitimate way, i.e., by inviting or suggesting a process of reasoning which the law does not allow" [para. 8].
\end{quote}

As the above CA commentary suggests, when a high risk of unfair prejudice exists, it may result in a social worker using evidence illegitimately when completing a section 18A assessment, that is, may make a decision on either an improper, illogical or emotional basis. Therefore, evidence that appeals to a social worker's sympathies, arouses a sense of horror, or provokes an instinct to punish, may cause a social worker to base decision making under section 18A on something other than the established propositions in the case (Mann & Blunden, 2010). For example, the drafting of the amendment itself potentially evokes feelings of disgust and anger towards section 18B(1)(a) parents; given the media coverage that such deaths attract. The evocative images associated with these deaths generate what Warner (2015) describes as a mass trauma response that can be triggered by subsequent media coverage of a completely different child. Potentially, this trauma response can be triggered by even reading the list of convictions; such as those outlined in section 18B(1)(a).

Alternatively, on hearing the evidence, the social worker may be satisfied with a lower degree of probability than would otherwise be required (ALC, 1985). For example, as outlined in chapter 2, under \textit{Woolnoth v Woolnoth}, the burden of proof against a father to prove ‘unfitness’ to have custody of his children required a much higher level of

\textsuperscript{37} 18B (1)(b)
\textsuperscript{38} 18B (1)(a)
\textsuperscript{39} [2007] NZCA 478
evidence than that of the mother. As outlined above, the usual adjudicatory process involved in a section 18A assessment when compared with a section 17 investigation process is severely restricted. Therefore, the opportunity for challenge by a subsequent parent of a social worker’s assessment is also limited.

By using the terms *allow the kind of harm that led to the parent being a person described in Section 18B* the provision is clearly aimed at establishing, based upon their past conduct, whether a subsequent parent is continuing to exhibit the behaviours that led to their categorisation as a subsequent parent under one of the two groups identified in 18B. However, from a practice perspective, it also assumes that whatever happened, the parent ‘allowed it’. This is highly problematic if domestic violence notifications are considered.

Women who go to court to charge their partners for domestic violence would never be considered to have ‘allowed’ him to abuse her. However, section 18A is making the assumption that even though both mother and children were victims of domestic violence, nevertheless, the mother will be considered to have ‘allowed it’ to happen in a subsequent child assessment. Gendered analysis research of how this aspect of a section 18A assessment is required to ensure the knowledge base around child-protection practice does not become unnecessarily discriminatory towards women.

In terms of social work practice, future research around how the role of a social worker under section 18A and its associated challenges is recommended. For example, determining whether the outcomes for these two different types of parents are different and in what way they may have been different is important, given the potential bias in operation between those with a conviction and those without or mothers who have a family violence history.
Chapter 10: Stage three – identification issues relating to unborn children

In the final phase of stage 3, chapter 10 takes an in-depth look at the unborn child concept as its inclusion into the definition of ‘subsequent child’ has potentially significant implications for practice and those parents targeted by section 18A. The CYFA1989 defines a subsequent child as a child born or unborn. The CYFA1989 does not define ‘unborn’, instead leaving this to practitioners to determine legislative clarity. Potentially, this ambiguity negatively impacts upon social work practice and law as practitioners are unclear about their jurisdictional boundaries around a completely new statutory client. This chapter attempts to draw upon religious and scientific discourses to assist in conceptualising an unborn baby. The chapter then proceeds to analyse the New Zealand legal perspectives to determine what current legal protections for unborn children exist in New Zealand, and to establish whether these existing protections can provide guidance for the extended jurisdiction of section 18A.

Different perspectives on the concept of unborn child

Rivière (1985) argues a definition of ‘unborn’ can never be based on purely scientific data. Science can provide the data about the development of the embryo and the foetus, but the point at which the embryo or foetus achieves a ‘potential for life’ or becomes a ‘person’ is a subjective rather than an objective assessment. An embryo refers to an unborn child growing from conception until the end of two months’ gestation. The term in vivo refers to (of processes) performed or taking place in a living organism. In contrast, in vitro refers to (of a process) performed or taking place in a test tube, culture dish, or elsewhere outside a living organism. Each of these terms represents significant legal, ethical and philosophical implications for the generic category under section 18A that is referred to as an ‘unborn child’. For example, could the section 18A protections apply to in vitro scenarios?
Legal principles around unborn children have been subject to considerable anomalies and inconsistencies. In the UK, for example, a lacuna\textsuperscript{40} in the law existed as it was not an offence to kill a child who was being born. This prompted the introduction of the Infant Life Preservation Act 1929 to address the situation where mothers ’strangled’ their babies at birth. However, when it was promulgated, its scope was considerably wider than this. Section 1(1) extended protection to ‘any child capable of being born alive’. This has since been referred to as the ‘viable foetus’ principle. Often, it is argued that the law is so divided on the subject that “it is impossible for the law to present a moral stance that will be acceptable to all” (Fortin, 1988, p. 55).

In the context of the criminal law, the Crimes Act 1961 provides limited protection for an unborn child (s 182). Although the Crimes Act 1961 recognises the unborn child as a ‘human being’, the foetus still lacks an independent ‘legal personality’ and is consequently unable to take advantage of the full range of protections available to it under the law. In stark contrast, a newly born receives the same level of protection as an adult. Whether ‘birth’ can be defined as either complete exit from the birthing canal (\textit{R v Poulton}\textsuperscript{41}), or the cutting of the umbilical cord (\textit{R v Trilloe}\textsuperscript{42}), or a baby’s first breath (\textit{R v Brain}\textsuperscript{43}), is more ambiguous. Often, the difference between an unborn and a newborn could be a matter of minutes, days or weeks so it appears relatively arbitrary that protections are unable to be extended to within the womb to at least the later stages of gestation, for example, when it is a viable foetus.

Fortin (1988) argues that “there should be more clarity of thought on the issues involved before sporadic legislation clouds the picture” (p. 55). Section 18A has put the issue plainly within contemporary child protection law and practice by including an ‘unborn child’ within the definition of ‘subsequent child’. This statutory expansion therefore represents another challenge associated with the implementation of section 18A, specifically, determining the stage of pregnancy that attracts section 18A’s protection.

\textsuperscript{40} An empty space in the law with no regulations applicable or an absent part in a law or another written document such as a contract. In other words, it denotes an instance when there is no controlling law or regulation.
\textsuperscript{41} (1832) 5 C & P 329
\textsuperscript{42} (1842) Carr and M 650
\textsuperscript{43} (1834) 6 C. & P. 349
New Zealand Position

The law of abortion in New Zealand developed differently than in England as it was largely implemented through criminal codes. The Criminal Code Act of 1893 was expressed in similar terms to ss 182 and 183 of the Crimes Act 1961. The Crimes Act 1961 is both a consolidating and an amending measure which therefore requires an appreciation of its historical development to understand the abortion umbrella that it operates under. However, under the general rule of construction in legal interpretation, a consolidated statute should be construed without recourse to its history, unless there is ambiguity.

Section 159 of the Crimes Act 1961 defines a 'human being':

A child becomes a human being within the meaning of this Act when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, whether it has an independent circulation or not, and whether the navel string is severed or not.

This statutory test therefore reflects the common-law tests as outlined above.44

The term "unlawfully" has been consistently used in the development of abortion law in New Zealand. This term has been faithfully reproduced from the 1893 Criminal Code to the Crimes Act 1961. Unlike England, New Zealand made no statutory provision corresponding to the equivalent of a ‘therapeutic abortion' being performed within a clinical environment. In the absence of this clarity, the common-law precedence established by the Bourne’s case was assumed to apply in New Zealand, which negated the need for legislative intervention. As a result, it has been left to the courts to consider whether New Zealand should adopt the line of precedence established by the Bourne45 case or whether New Zealand abortion law would depart from it.

Bourne’s Case

A 15-year-old became pregnant as the result of rape. A surgeon performed an abortion given the risk to her ongoing mental health the pregnancy represented. He was charged

44 R v Poulton; R v Triloe; R v Brain
45 [1938] 3 All ER 615
under the Offences against the Person Act 1861, s 58, with unlawfully procuring the abortion of the girl.

The jury was directed that it was for the prosecution to prove, beyond reasonable doubt, that the operation was not performed in good faith and for the purpose of preserving the life of the girl. The jury found that the surgeon was under a duty to perform the operation if, on reasonable grounds and with adequate knowledge, he was of opinion that the probable consequence of the continuance of the pregnancy would cause his patient long-term physical and mental harm.

Determining the level of existing protection for unborn children in New Zealand

*R V Woolnough*[^46]

In this CA case, a doctor was charged with 12 counts of procuring a miscarriage contrary to section 183(1) (b) of the Crimes Act 1961. It states:

> Everyone is liable to imprisonment for a term not exceeding 14 years who, with intent to procure the miscarriage of any woman or girl, whether she is with child or not
> a) unlawfully administers to or causes to be taken by her any poison or any drugs or any noxious thing or
> b) Unlawfully uses on her any instrument

The trial judge advised the jury that the test for ‘unlawfully’ is whether it is necessary to preserve the woman from serious danger to her life or to her physical or mental health, not being the normal dangers of pregnancy and child birth. During his summing up to the jury, the judge said:

> “...that pregnancy and child birth have always represented certain risks. Furthermore, unmarried women who are pregnant are probably under greater emotional and mental strain than if they are not pregnant” (p. 509).

The trial judge directed the CA to consider whether this direction on ‘unlawfully’ was correct in law.

[^46]: [1977] 2 NZLR 508
The CA affirmed the trial judge's jury instruction. The CA highlighted that consideration of the word 'unlawfully' is accepted by the Solicitor General as—

...the preservation of the life of the mother can be properly regarded from a long term as well as a short-term point of view, so that the risks of danger to physical or the mental health can be taken into account. (p. 512 CA)

The Solicitor General highlighted it was insufficient to merely identify that the mother's physical and mental health would suffer. The health threat would also need to carry with it a real risk to the mother’s life.

In the course of this case, Richmond J discussed how the stage of gestation was a relevant factor for consideration. The Woolnough case involved abortions in the first trimester of pregnancy. Richmond J was therefore of the opinion that section 182 had no application in such cases. Justice Richmond also indicated that a different test of 'unlawfulness' applied at different stages of gestation. At the later stages of pregnancy, the greater the justification needed for a termination.

In his dissenting judgement, Wild J indicated that the Bourne case provided the first judicial exposition of what the term 'unlawfully' entails. For Justice Wild, the important factor to consider is whether an abortion is necessary for the purpose of preserving the life of the mother. In his opinion, the current decision was a judicial extension of the direction in Bourne. It introduced a preservation of health, physical or mental health as a purpose separate and distinct from the preservation of life. In Justice Wild’s opinion, if the test of lawfulness is to be allowed to cover such cases, then it is the function of the legislature, not that of the courts, to enlarge it. For Wild J, given this is such a highly controversial field, Parliament has not only the responsibility but also the duty to ensure legislative clarity. This occurred at rapid pace following Woolnough by section 6 of the Crimes Amendment Act 1977 (1977 No 113).
187A Meaning of unlawfully

On 16 December 1977 by section 6 of the Crimes Amendment Act 1977 (1977 No 113), section 187A was inserted into the Crimes Act 1961. The definition provides a bright line test of 20 weeks’ gestation.

Where pregnancy is not more than 20 weeks’ gestation, a termination is allowed if—

the continuance of the pregnancy would result in serious danger to (not being danger normally attendant upon childbirth) to the life, or to the physical or mental health, of the woman or girl.

When considering this ground, the following factors can be taken into consideration:

The age of the woman or girl concerned is near the beginning or the end of the usual childbearing years and there are reasonable grounds for believing that the pregnancy is the result of sexual violation.

An abortion can also be performed if there is substantial risk that the child, if born, would be so physically or mentally abnormal as to be seriously handicapped.

In addition, an abortion is permitted if pregnancy is the result of sexual intercourse between a parent and child, a brother and sister, whether of the whole blood or of the half-blood, a grandparent and grandchild.

Finally, a termination is allowed if the pregnancy is the result of sexual intercourse that constitutes an offence against section 131(1) of the Crimes Act 1961 or that the woman or girl is severely subnormal within the meaning of section 138(2) of the Crimes Act 1961.

In relation to pregnancies over 20 weeks’ gestation a termination is allowed if it is necessary to save the life of the woman or girl and to prevent serious permanent injury to her (i) physical health (ii) mental health.

It is the role of the two certifying consultants to determine whether there are grounds under New Zealand law for performing a termination. It is not the role of the general practitioner to determine whether there are legal grounds for termination.
In the matter of Baby P

Baby P’s mother was a 15-year-old girl who remained in a relationship with the father. Baby P’s father had previously attacked Baby P’s mother and threatened to kidnap and kill the baby. The birth was expected in the next few weeks. The mother was already under the custody of the Director-General of Social Welfare and concern for the welfare of the unborn child prompted the Director-General of Social Welfare to apply to the court for a declaration that she was in need of care or protection. The question arose whether the foetus was a ‘child’ within the meaning of the CYFA1989 and therefore able to benefit from the protective jurisdiction of the court.

Held: granting the declaration.

In making his decision, Judge Inglis argued that Baby P was at a stage of development when he would be capable of living independently of his mother. In effect, Judge Inglis applied the ‘viable foetus’ doctrine. Judge Inglis sought support for his decision from section 182 and section 159 of the Crimes Act 1961, provisions that protect the unborn child at 20 weeks of gestation. The protection applies whether or not it is capable of being born alive.

However, the judge declined to consider whether protection under the CYFA1989 could apply at an earlier stage of gestation. Judge Inglis then went on to consider overseas authority as to whether an unborn child has a separate legal personality. In reaching his conclusion, Judge Inglis made a distinction between whether an unborn child is a legal person and whether it was a human being entitled to protection under the CYFA1989. Although he agreed an unborn child was not a separate legal person, nevertheless it was entitled to protection.

Subsequent commentary disagrees with his Honour not to equate protection under the specific legislation—where the statutory term is a child—with the question of whether the unborn child is a legal person. In their opinion, the statutory term can only encompass ‘legal persons’ (Fortin, 1988). The general trend of decisions in common law is not to confer rights on unborn children as legal persons (Glazebrook, 1993). Hence, in England, an unborn child cannot be made a ward of the State or be subject to the courts

[1995] NZFLR 577
inherent jurisdiction. The criticism of Judge Inglis’s decision revolved around it creating a conflict between the unborn child and with the mother's own interests (Rosamund, 2004). Specifically, the decision provides the opportunity for control to be exercised over the mother’s behaviour during pregnancy for the benefit of her unborn child. This potential conflict has caused the English Court to shy away from deploying any legal regime for the benefit of the unborn child at the expense of the mother’s interests (Fortin, 1998; Rosamund, 2004).

*R v Henderson* 48

Henderson was convicted in the High Court under s 182 of the Crimes Act 1961 of causing the death of an unborn child. He had assaulted the child’s mother in circumstances which justified the conclusion that he had intended to kill the unborn child. The elapsed period of gestation was estimated at 26 weeks.

The word ‘child’ in section 182 of the Crimes Act 1961 embraces a foetus. Without determining when a foetus becomes a child, the foetus in this case was of about 26 weeks’ gestation, well past the 20 weeks’ gestation period referred to in s 187A(3) of the Crimes Act 1961, and the ordinary and natural meaning of the word ‘child’ included the foetus in this case. It was, accordingly, an unborn child. There was no need to impose a test of capability of birth and therefore, no onus on the Crown to prove that the child was capable of being born alive.

The 20-week gestation period referred to in section 187A of the Crimes Act 1961 is a bright-line test.49 Given the death of the foetus occurred after a 20-week gestation period, the Crown was not required to adduce evidence that the foetus was capable of being born alive. However, the Court made it clear that the accused could not be found guilty of ‘murder’ as even though it was older than 20 weeks’ gestation, it had not been born when death occurred therefore not “independent of its mother”. Hence, the court recognised that the foetus had no separate legal existence. The Court considered what would have happened if the assault had triggered the birth of the baby from which it

48 [1990] 3 NZLR 174
49 A bright-line rule (or bright-line test) is a clearly defined rule or standard, composed of objective factors, which leaves little or no room for varying interpretation. The purpose of a bright-line rule is to produce predictable and consistent results in its application.
subsequently died. This would have resulted in a murder conviction (*R v Senior*\(^{50}\)) in recognition that the birth crystallises full legal personality.

*Re an Unborn Child*\(^{51}\)

This case involved the production of a pornographic film where the birth of a baby was to be featured. The Chief Social Worker filed to place the ‘unborn child’ into the ‘guardianship’ of the Court. In supporting the ratio expressed by Judge Inglis in *Baby P*, Justice Heath established that the term ‘child,’ as used under the wardship jurisdiction (now called guardianship of the court), applies to the ‘unborn child’.

In upholding the application, Heath J included an ‘unborn child’ within the definition of ‘child’ as used in the Guardianship Act 1968.\(^{52}\) There were several factors specifically relevant for the New Zealand legal environment that Heath J took into account when formulating his decision. First, New Zealand has ratified the United Nations Convention on the Rights of a Child which expressly recognises the existence of rights for a child before birth. Secondly, although Heath J recognised that a mother cannot be compelled to do anything *positive*, it does not mean that orders forbidding her (or anyone else) to refrain from an action cannot be made within the protective jurisdiction of the court. Finally, the decision is consistent with other legislation in New Zealand that protects the unborn child, for example, the Crimes Act 1961 and the Contraception, Sterilisation and Abortion Act 1977.

Although Heath J reached the same decision as Judge Inglis in *Re Baby P [an unborn Child]*, he reached it by a different route. As he outlined, Judge Inglis took this view as

“...medically and physiologically there is only a minor, if not imperceptible difference of degree between the unborn child’s state of development and the state of development which would be reached after birth” (p. 130).

Although relying upon this decision, Heath J recognised the criticisms that this decision attracted as it

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\(^{50}\) (1832) 1 mood cc 346

\(^{51}\) [2003]1 NZLR 115; [2003] NZFLR 344

\(^{52}\) The Care of Children Act 2004 replaced the Guardianship Act 1968
“...created the potential for the court to control the mother’s behaviour during pregnancy – even if it is for the purpose of promoting the welfare of the unborn child” (p. 130).

However, the court was clear. The relief could not compel the mother to do anything positive against her will. Heath J outlined the strong policy reasons why the law should keep out of, and not police, maternal prenatal conduct. Interfering coercively in a mother’s conduct during pregnancy may result in greater harm to unborn children if mothers are afraid to seek help because of the risk of being subject of coercive measures if they do not conform to expectations. This is also driven from the impossibility of setting a clear and bright line between 'acceptable' and 'unacceptable' maternal behaviour. In addition, enforcing coercive orders against pregnant women is fraught with practical difficulties. Finally, it is undesirable for the trappings of the law to be deployed to force competent individuals to submit to interference with their bodily integrity.

Heath J concluded his discussions on the definition of a child by stating that

“It is possible to get into English arguments over the stage at which an unborn child becomes child. Arguments of that type ultimately serve no useful purpose. In my view, it is preferable to regard the definition of encompassing both 'unborn' and 'born' children and then approach the question whether it is appropriate to grant relief as a matter of discretion” (p. 134).

The injunction did not interfere with the birth process but only restricted the use of the photos; therefore, maintaining Heath J’s position that the ‘physical integrity’ of the mother’s body and her right to exercise autonomy over it was upheld.

\[ R v M^53 \]

The respondent (AB) suffered from severe chronic schizophrenia. She was an in-patient at the Mason clinic and was 11 weeks pregnant. The respondent was extremely violent towards staff at the clinic and she had no insight into her mental illness. The obstetrician and psychiatrist were under the opinion that a birth under her current mental health would result in serious threat to the health of both mother and baby. The

\[ ^53[2005] NZFLR 1095 \]

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respondent had consistently refused medical treatment for the unborn baby. Counsel for AB argued that detention and treatment under section 30 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 did not authorise treatment for her pregnancy. However, counsel did not argue on the grounds that the unborn child had no legal status; they argued on the grounds that a pregnancy was not a mental disorder and therefore outside the jurisdiction of the Mental Health (Compulsory Assessment and Treatment) Act 1992. Judge Robinson stated that as there was evidence of a mental disorder, this diagnosis "gave him the jurisdiction to grant the application" [para. 9]. The sentient point was whether AB lacked capacity under section 5 of the Protection of Personal and Property Rights Act 1988.

In *KR v MR,* the High Court established four factors to consider when assessing capacity under the Protection of Personal and Property Rights Act 1988. The High Court assesses an individual’s capacity to make relevant decisions; communicate choice; to comprehend relevant information and its consequences. When assessing each of these components, Judge Robinson found AB had the capacity to understand the nature and consequences of decisions in respect of matters related to her pregnancy and delivery of her baby. Judge Robinson found AB was also capable of communicating her choice and of understanding all relevant information and she demonstrated an appreciation of the situation and its consequence and an ability to follow a logical sequence of thought to reach a decision. For example, AB clearly outlined that she wanted a natural birth, but would consent to a caesarean if her health or that of the baby was at risk.

Of the four components outlined by the High Court as necessary in determining capacity, Judge Robinson formed the view that AB,

"...does not have the ability to manipulate the information. For example, because she does not believe that she has a mental disorder, “she is unable to understand and appreciate the complications caused by her mental disorder” [para27]."

Judge Robinson clearly outlined that if he was not satisfied that AB lacked capacity, he would not have the jurisdiction for granting the application. However, Judge Robinson

54 [2004] 2 NZLR 847
did not address AB’s constitutional right to refuse medical treatment for her unborn baby under section 11 of the NZBORA, as the following case indicates was possible.

Ministry of Social Development v R

There were two respondents in this case: the mother (R1) and the unborn child (R2). Judge Adams had appointed a lawyer to represent the unborn child’s interests, although these ‘interests’ were not reflected in the oral judgement. Two applications were before the court. The first application was made by the CE of CYF under section 31(2)(f) of the COCA to have R1 placed under the guardianship of the court and the CE made the court’s agent. The second application was to have R2 attend a medical examination by way of an ultrasound and, if necessary, a forced induction. R1 was already in the custody of the CE and was approximately 43 weeks pregnant. R2 was under an interim custody order under section 78 of the CYFA1989; that would take effect upon R2’s birth. R1 had been refusing medical treatment and antenatal care throughout the duration of her pregnancy. Under ss 49–58 of the CYFA1989, medical treatment and examinations could be imposed. The medical evidence stated:

“...if we are unable to intervene when medically indicated then the lives and wellbeing of both respondents could be at significant risk, depending upon the clinical circumstances at the time” [p. 19].

Furthermore, the CE adduced medical evidence that gestation over 42 weeks is outside standard clinical practice and known to be associated with the stillbirth of the baby.

When considering this case, Judge Adams referred to D v Berkshire CC.57 In this case, the House of Lords ruled that when considering the need to make a care order, the juvenile Court had properly considered events occurring and circumstances existing prior to the child’s birth. While recognising the unborn child does not gain independent legal status until birth, nevertheless, the House of Lords was prepared to acknowledge that in certain circumstances, the law may properly concern itself with the treatment of unborn children. However, Judge Adams noted that section 36(1) of the COCA allows a child

56 Sections titled: “Procedures in relation to medical examinations of children and young persons”
57 House of Lords (8 Oct, 4 Dec 1986)
over the age of 16 years old to refuse medical treatment. Such a provision is consistent with UNROC and section 11 of the NZBORA. Section 11 states that

“...everyone has the right to refuse to undergo any medical treatment”. In his decision, the judge stated that there is no evidence that the first respondent is “mentally defective or suffering from any mental disorder” (para 25).

In refusing both applications, Judge Adams relied upon Justice Heath’s ratio in *Re Unborn Child*. In addition, Judge Adams relied upon the United Nations Convention of the Rights of the Child (which the judge found consistent with section 36(1) of COCA, and section 11 of the NZBORA. Judge Adams held that R1 (was over 16 years of age) had the right to refuse medical treatment. Judge Adams states

“...to make such an order of an unborn child makes a serious incursion into the liberty and rights of the mother ...to hold otherwise is to treat her as little more than conveyance for the child” (para. 39).

In fully asserting the mother’s right to self-determination, and consistent with Justice Heath’s decision in *Re: An Unborn Child*, Judge Adams confirmed the principle that “a pregnant mother should not be forced to do something positive against her will...but she can be prevented from taking an action” (para. 38).

*CLM v Chief of the Ministry of Social Development* 58

In certain circumstances, an application for review of a Family Court decision under CYFA1989 can be entertained. In this case, Harrison J granted a declaration that the Family Court had breached a mother’s right to natural justice under s 27(1) of the NZBORA, when it had made an order, without notice, placing the mother’s then unborn child in the interim custody of the CE of MSD. From the judgement, it is clear that an ante natal assessment was completed based upon the psychosocial environment of the mother. In addition, the history of the mother was also taken into account as she had her previous four children taken into custody at the time that the interim custody order was sought. In the decision, Harrison J took notice that the social worker completing the assessment states that the infant would be “highly vulnerable after he/she is born” (p. 58 [2011] NZFLR 11
12). However, what was significant is that no reference was made in the social worker’s notes of proposals to remove the unborn baby from the mother’s custody upon birth (p. 13). In dicta, the judge stated:

…it must be acknowledged from the outset that CYFS had proper grounds for applying to the Family Court for a declaration that CLM’s unborn child was in need of care and protection and pending determination of that application, for an interim custody order. The evidence justified CYFS concerns about the future welfare of CLM’s baby. (p. 13)

This dictum suggests the ability of the court to issue an interim custody order for an unborn child is arguable. The dictum contrasts with the line of English precedence where the ability to take orders is contingent upon a child gaining an independent legal personality. Once that happens, then the full protections available under the law apply. Under English law, this does not happen until the physical birth of the child.

In New Zealand, there is a recognition that an unborn child is entitled to certain legal protection; once is has become a viable foetus. This is supported by dicta from Heath J who states

“...it will be rarely necessary for parties to resort to the inherent jurisdiction of this court...the issue of this particular case is whether an unborn child is a child ...only if the answer is no to that question would it be necessary to invoke the residual jurisdiction” [para. 36].

Heath J therefore indicating that even where an unborn child is not within the definition of a child of a particular statute, it will potentially, nevertheless, attract the protection of the Court in its inherent jurisdiction. Under this jurisdiction, the unborn baby will have legal status where the order can be made before birth, but the protection will begin upon birth. However, for the purposes of this case, Justice Heath answered the question in the affirmative, therefore, whether legal protection for an unborn child is provided under the Court’s inherent jurisdiction remains unclear.

Clearly, all these cases were decided when the situation regarding an unborn baby was not made clear in CYFA1989. In relation to section 18A, the inclusion of an unborn baby has clarified this issue to a limited extent. However, what section 18A has not clarified is the stage of gestation the protective jurisdiction of section 18A applies from. For example, should it apply from the whole stage of pregnancy and if so, consistent with
the Crimes Act 1961, should a 20-week gestation period be recognised so that pregnancies before this 20-week period attract a different level of protection than pregnancies after 20 weeks. Furthermore, consistent with Justice Heath’s dictum, it would be necessary to establish what factors contribute towards balancing the mother’s rights over with those of her unborn baby. Consistent with the recommendation in the Smith (2011) report, the recent reform appears to be placing more emphasis upon the ‘best interest of the child’ rationale, which may potentially represent a significant determining factor when the balancing of rights between mother and child are made.
Chapter 11: Stage four – potential outcomes for section 18B (1)(a)

Stage 4 has a specific focus upon the first population of parents affected by the amendment – section 18B(1)(a). When making submissions about the Child Harm Protection Orders, the Legislative Advisory Council AC (2013) stated:

“...the practical ramifications of establishing a two-tier enforcement system involving both civil and criminal procedures include issues such as double jeopardy/punishment or self-incrimination”.

This population of parents identified under section 18B(1)(a) is unique given section 18A is triggered in relation to their criminal conviction history. How the amendment therefore interacts with the New Zealand Bill of Rights Act 1990 in relation to this population of parents is examined in this chapter.

Privilege against self-incrimination

The application of the privilege of self-incrimination in civil proceedings is governed under the Evidence Act 2006. Under section 60, privilege applies in a criminal proceeding but section 63 states that it does not apply in a civil proceeding. Section 18A is not a criminal proceeding, but it is also not a civil proceeding. Whether section 60 applies to actions under CYFA1989 for section 18B(1)(b) parents therefore requires future research.

The privilege is defined under the Evidence Act 2006 as—

60 Privilege against self-incrimination
(1) This section applies if—
(a) a person is required to provide specific information—
(i) in the course of a proceeding; or
(ii) by a person exercising a statutory power or duty; or
(iii) by a Police officer or other person holding a public office in the course of an investigation into a criminal offence or possible criminal offence; and
(b) the information would, if so provided, be likely to incriminate the person under New Zealand law for an offence punishable by a fine or imprisonment.
(2) The person—
(a) has a privilege in respect of the information and cannot be required to provide it; and
(b) cannot be prosecuted or penalised for refusing or failing to provide the information, whether or not the person claimed the privilege when the person refused or failed to provide the information.

(3) Subsection (2) has effect—
(a) unless an enactment removes the privilege against self-incrimination either expressly or by necessary implication; and
(b) to the extent that an enactment does not expressly or by necessary implication remove the privilege against self-incrimination.

Currently, it is not clear whether this privilege would apply for a subsequent parent under section 18B(1)(a). The LAC (2013) were of the opinion that any person who was being subject to a CHPO would have the benefit of that privilege. As argued previously, given section 18A replaced CHPOs, whether a subsequent parent, who has been convicted of a specified offence and being subject to a section 18A assessment, would attract the protection of the privilege given any statements that they make may attract further criminal liability if MVCOT proceeded to apply to the Family Court for a declaration. If the privilege were to apply this would hugely benefit subsequent parents under section 18B(1)(a) as the privilege states that a person cannot be prosecuted or penalised for refusing to provide the information. Whether having your rights under section 15 and 16 of the COCA abrogated for refusing to provide information under a section 18A assessment amounts to being penalised or whether that privilege has been removed under section 60 (3)(a)(b) would require future research.

Furthermore, section 37 also provides legal privilege in respect of FGCs and their associated outcomes. One of the criteria for the identification of a section 18B(1)(b) parent is that they have had an FGC agree that “there is no realistic prospect that the child would be returned to the person’s care.” Whether the information that was provided at the initial FGC can then be used to inform a section 18A assessment has not been considered. For example, section 18A(b) states “unlikely to allow the same kind of harm”. The amendment does not specify how the ‘same kind of harm’ is to be identified. For example, is it the ‘same kind of harm’ that was outlined in the initial notification or was it the ‘same kind of harm’ that was identified following disposition. This point is important because the harm that is identified at initial notification can change dramatically from the harm that is identified or agreed at an FGC. The author suggests

59 Section 18B(2)(c).
the ‘harm’ identified and agreed at an FGC is the pertinent ‘harm’ for a section 18A assessment, as this is the ‘harm’ that is the qualifying characteristic for a section 18A assessment. As a result, using this information from a historical FGC, to trigger another statutory response in relation to a completely different child, would appear to breach the privileged status that FGCs are provided under section 37 of the CYFA and section 60 of the Evidence Act 2006. There does not appear to be an express removal of FGC privilege provided in the suite of VCA amendments. Whether it can be ‘implied’ requires further research.

Section 27(2) Rights to Justice

Bill of Attainder

Section 27(2) of NZBORA states—

Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

The section 27(2) reference to ‘other public authority’ would indicate that protections around the bill of attainder operates in New Zealand. A bill of attainder is therefore a clear takeover of a judicial function by the legislature. When the result of the legislative act of the conviction is death of the individual, it is a true bill of attainder. If the legislative act is for something less than death, such as loss of property or liberty due to imprisonment, the law is technically known as a bill of pains and penalties. However, both are frequently lumped together under the title of bill of attainder. In each case, the condemned person or group suffers a complete loss of due process.

In Liyanage v the Queen, the United Kingdom Privy Council decided a bill of attainder case that has been cited as precedent ever since by commonwealth countries. In its ratio, the Privy Council expounded on how a bill of attainder alters and jeopardises the separation of powers.

\[60\text{In R v Poumako (2000) 17 CRNZ 530}\]
\[61\text{[1967] AC 259}\]
They noted that

These alterations constituted a grave and deliberate incursion into the judicial sphere. Quite bluntly, their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences. ... If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges. (at 284–285)

Ostler (2014) argues “temptation for Parliaments to enact bills of attainder clearly continues” (p. 86). In many cases, bills of attainder are not always identified or made the subject of judicial review or challenge. The lack of a court challenge is sometimes because of a claimant’s lack of funds, or that the persons targeted by the law lack ‘standing’ to bring a challenge, or because the very bill of attainder took that right away (Ostler, 2014). In essence, the constitutional function of the judiciary is usurped by the legislature. This chapter argues that the first right identified as being affected by the subsequent children’s provision is the fundamental right to protection from the application of a bill of attainder.

A bill of attainder occurs when the legislature identifies an individual or group and passes a law convicting them of a crime, effectively taking away their property or liberty, without affording them a trial to contest the issue.

Clearly, section 18A is not creating an offence.

However, this chapter highlights that section 18A may trigger section 27(2) of the NZBORA by inadvertently crossing protection and punitive jurisdictional boundaries. For example, by specifically targeting those with criminal convictions and then imposing an intervention based upon that conviction, the amendment becomes retrospectively involved in this criminal conviction process. This perspective is reinforced by the LAC (2013) who observed that although the purpose of Child Harm Protection orders was to be preventative; nevertheless, the LAC (2013) regarded the orders as punitive in nature. A punitive nature is created when an individual, who is specifically targeted by an enactment, suffers a complete loss of due process. As outlined in chapter 7, section 18A completely circumvents the usual investigative process that the majority of the care and protection population under the CYFA1989 are subject to. Although subsequent parents are still afforded a process, their process is arguably
significantly more onerous given it can be triggered without any actual harm to subsequent children being evident. Whether subsequent parents have suffered enough of a loss of due process to trigger the protection of section 27(2) of the NZBORA is therefore untested and will require future jurisprudential research.

This potentially punitive nature has implications in relation to NZBORA. As section 18B(1)(a) parents are being targeted due to their past criminal convictions, the possibility that section 18A can be retrospectively applied to their convictions thereby increasing the original sentence merits discussion given sentencing has been the main context in which bill of attainder issues have been raised. For example, in *R v Poumako* Thomas J held that

> ...section 2(4) of the Criminal Justice Amendment Act (no2) 1999 is incompatible with the cardinal tenets of liberal democracy. The Court would be compromising its judicial function if it did not alert Parliament in the strongest possible manner to the Constitutional privation of this provision. (p. 546)

In dicta, Thomas J opined that the provision was ‘dangerously close to a bill of attainder’.

### Two characteristics of a Bill of Attainder

Two characteristics of a bill of attainder are therefore required. First, the groups that it applies to need to be readily identifiable. Second, their legal rights, compared with others in a similar situation, have been significantly diminished. The section 18A amendment potentially meets both these criteria.

#### Readily identifiable population

Each group of subsequent parents identified under section 18B has several distinguishing features that is relevant in relation to this requirement. The population being targeted under 18B(1)(a) is remarkably small; this is especially true when compared with the group identified under 18B(1)(b). The group in 18B(1)(b) would probably capture a significant proportion of children who are in permanent care as section 14(1)(a) and (b) are probably the most common grounds for a declaration at a FGC. The identification of the group in 18B(1)(a) is also extremely easy to establish as a conviction is a matter of record. In *R v Poumako*, Thomas J’s dicta observed that
“widespread media publicity relating to crimes in the home had been given to certain cases and the persons who the provision was aimed at were readily ascertainable” (p. 556).

There is no doubt that the group of 18A(1)(a) subsequent parents would likewise be readily identifiable, given the widespread media attention that certain child fatality cases attract.

In relation to the group under 18B(1)(b), MVCOT will have sufficient records to ensure that this group are also readily identifiable. What differentiates these two groups is the extent to which their identities are publicly available. For example, information relating to the identities of subsequent parents in an 18A(1)(b) are only held by MVCOT and are therefore not publicly available. This is especially true given the privilege that outcomes from a FGC attract.

Rights being Diminished

The rights being diminished for both sets of subsequent parents are their rights to parent subsequent children. The judicial rights issue around Bill of Attainder was addressed in Morgan v Superintendent, Rimutaka Prison. Morgan v Superintendent, Rimutaka Prison.

Morgan was convicted of cultivation and possession of cannabis, and sentenced to three years in prison. When Morgan committed the crime, the law allowed for parole after two-thirds of a sentence was completed. When Morgan was sentenced, this parole law had been changed by the Sentencing Act 2002 and the Parole Act 2002 and no longer allowed for the earlier parole date. Morgan brought a suit after serving two years of his prison sentence, asserting that the former law should apply and he should be released. Morgan argued that the new laws, which eliminated his parole, were a bill of attainder. The New Zealand Court of Appeal summarised this argument, noting

the appellant has argued that if the 2002 Act were to apply to a person in his situation, the effect would be to subject the person to a form of legislative punishment aimed specifically at a particular person or group. It would accordingly have the character of a bill of attainder. We disagree.

[2005] 3 NZLR 1 (CA)
The Court majority concluded that the 2002 Acts had general applicability and did not target any particular person or group. However, this dictum can be distinguished in application to section 18A given the amendment specifically identifies two groups of parents that the provision only applies to. The Court further ruled that there was no violation of the NZBORA since the law had no impact on Morgan's actual sentence, but only on how that sentence was administered. Once again, this dictum can be distinguished in relation to section 18A given both groups of parents under section 18B(1)(a) and (b) are being subject to a completely separate judicial process, especially when this population of parents are compared with the majority of other parents who interact with the protective jurisdiction of CYFA1989.

Section 25(g) Minimum standards of criminal procedure

Section 25(g) provides a constitutional right to a “minimum penalty”. Section 25(g) of NZBORA states:

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

(g) the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty

Clearly, this constitutional right would apply only to subsequent parents identified under section 18B(1)(a) because s18A is targeting this group of parents based entirely upon their criminal convictions. Whether section 18A potentially imposes an additional penalty upon this group of subsequent parents requires analysis.

Section 2 of the Crimes Act 1961 defines an offence as:

any act or omission for which anyone can be punished under this Act or under any other enactment, whether on conviction on indictment or on summary conviction

The courts in New Zealand, for the purposes of applying section 25(g) of the NZBORA, generally interpret the word ‘offence’ consistently with this definition. The CA in Daniels
states protection against double jeopardy only applies in respect of a further criminal prosecution for a criminal offence for which the accused has already been convicted or acquitted.

However, there are indications that the Courts might not apply such a strict definition in respect of sections 24 and 25 of the NZBORA. The CA in *Drew v Attorney-General* was asked to consider whether disciplinary offences in prisons were of sufficient character to meet the definition of an offence for the purposes of sections 24 and 25 of the NZBORA. The CA did not reach a finding on this matter but left a clear signal to suggest that offences other than criminal offences might fall within the definition. The implication for this potential line of precedence is important if the comments by the LAC (2013) stated above are taken into account. If, as the LAC (2013) suggest, similar to the Child Harm Projection orders, section 18A is regarded as not only preventative but also punitive in nature, then the constitutional rights under section 25(g) can potentially be triggered for both groups of parents under section 18B(1)(a) and (b).

The effect of 25(g) of the NZBORA was examined in *Palmer v Superintendent Auckland Maximum Security Prison*. In this case, Wylie J examined the use of the word *penalty* in that section, Wylie J stated

"...an offender must accept the consequences of a change in legislation following his/her sentencing in relation to the administration of their sentence provided that the penalty or punishment is not increased" (p. 244).

This chapter argues section 18A provides an additional punishment to those parents identified in section 18B(1)(a) because they are being subject to an additional restriction of their freedom (i.e., being subject to a section 18A assessment that will ultimately result in another court appearance at disposition). In this judgement, Wylie J made a distinction between the imposition of a sentence and the administration of a sentence (p. 244). In *R v Poumako* it was appropriate to declare 2(4) inconsistent with

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63 [1998] 3 NZLR 22 (CA)  
64 (No 2) (2001) 18 CRNZ 465 (CA)  
65 [1991] 3 NZLR 315
both 25(g) of the NZBORA and Article 15 of the International Covenant on Civil and Political Rights.

Section 26: Retrospective legislation

Under section 26(1) persons are entitled to expect the law to be sufficiently clear and certain so that he or she can confidently carry out certain activities (or decide not to carry out those activities) safe in the knowledge that those acts or omissions comply with the law.

Section 26 of the NZBORA states:

(1) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.

(2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

Section 26(1) is concerned with ensuring that the law is sufficiently certain and clear to enable individuals to refrain from, or perform, activities with the confidence that their behaviour complies with the law. It ensures that persons are not punished for doing something that was not unlawful at the time. Section 26 is consistent with Dicey (1959) who outlines that a major component of the rule of law is that a person should only be convicted and punished on the basis of existing law. In New Zealand, the LAC (2013) has previously provided comment on the issue of retrospectivity. The LAC (2013) observes that legislation should, in general, have prospective effect only. In particular, it should neither interfere with accrued rights and duties, nor should it create offences retrospectively. Legislation should, in general, neither deprive individuals of their right to benefit from judgements obtained in proceedings brought under earlier law, nor to continue proceedings asserting rights and duties under the law. The European Court of Human Rights has also taken the view that the prohibition against retrospective offences is to guard against arbitrary prosecution, conviction and punishment.

66 Fulcher v Parole Board (1997) 15 CRNZ 222
The European Court of Human Rights adopts the approach that as long as the development in the law is ‘reasonably foreseeable’, then the prohibition against retrospective offences does not apply. Developments in the law may be reasonably foreseeable in situations where a person who is engaged in an activity that entails a degree of legal risk, searches out legal advice as to the legal risks associated with a course of action. However, where conduct is of an ongoing nature and is only unlawful for a part of that period, only the conduct that took place after the law change can be prosecuted. Although the general principle applies to all statutory provisions that have retrospective effect, section 26(1) is primarily concerned with retrospective offences.

Determining the extent of the abrogation of rights under section 26(1) is therefore complex if we take into account the need of ‘reasonable foreseeability’ and how this may apply to each of the groups identified as subsequent parents. As at 1 July 2016, those subsequent parents, with a specified conviction, could definitely argue that at the time of their conviction, the section 18A amendment was not ‘reasonably foreseeable’ given it had not even been signalled by Parliament (through Hansard, etc.) that it was a possibility. Likewise, section 18B(1)(b) parents could raise a similar argument that this amendment was not ‘reasonably foreseeable’, based upon similar grounds.

For section 18B(1)(b) parents, it is strongly arguable that if it was ‘reasonably foreseeable’ their subsequent children would be subject to an immediate assessment, they may have provided more of a challenge at the FGC process. For example, if section 18B(1)(b) parents had known at the time that agreeing to the grounds under sections 14 (1)(a) or (b) would have implications for them as subsequent parents, they may have provided more of a challenge to those particular grounds being agreed at this first FGC. As the above analysis demonstrates, it is only at this extremely early juncture that a parent is able to make their first legally strategic challenge to their categorisation as a ‘subsequent parent’ because once they are categorised as a subsequent parent, any adjudicatory challenge is limited.

This may still have resulted in a declaration, but if the declaration was made under other grounds other than section 14 (1)(a) or (b), then the subsequent parent process

67 Whether as the consequences of Parliamentary scrutiny or judicial interpretation
would not apply to them in the future. Section 14(1)(a) refers to a child or young person suffering physical, psychological or sexual harm as a result of ill-treatment, abuse or derivation. In contrast, section 14(1)(b) raises a care and protection concern if a child or young person’s developmental, physical and mental wellbeing is likely to be impaired and this impairment is likely to be serious and avoidable. However, the remaining grounds refer to serious differences between carers, parents and guardians that may cause physical, mental or emotional harm; a child or young person’s behaviour is likely to cause physical or mental harm to themselves or others and either their parents, the persons having guardianship or care of them are unable to control them or if they are between the age of 10 years and 14 years and are offending. Section 14(1)(f) addresses situations where a parent, caregiver or guardian are unable or unwilling to care for the child. This provision can potentially be interpreted broadly and would easily encompass concerns raised in sections 14(1)(a) and (b).

However, as section 18A begins to take effect, reliance upon this line of argument loses traction. Now, when section 18B(1)(a) offences are committed and section 18B(1)(b) FGC declarations are made, it is ‘reasonably foreseeable’ that an 18A assessment will apply to them in the future. However, parents will need to be extremely proactive about obtaining legal advice before an FGC is held, given the grounds for an FGC are not normally communicated until the day of the FGC. When a referral to FGC is made, section 19(1A) does not make it a requirement that the ‘grounds’ for an FGC are required in the ‘statement of reasons’. The referral only needs to provide reasons for the belief that a child is in need of care and protection. The only legal representation present at a FGC is a lawyer for child, who are entitled members. However, a lawyer

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68 Section 14(1)(c)
69 Section 14(1)(d)
70 Section 14(1)(e)
71 Every referral pursuant to subsection (1) shall be accompanied by — a statement of the reasons for believing that the child or young person to whom the referral relates is in need of care or protection; and (b) particulars sufficient to identify any person, body, or organisation that might be contacted to substantiate that belief; and (c) a statement indicating whether or not the referral is being made with the consent or knowledge of— (i) the parents or guardians or other persons having the care of the child or young person to whom the referral relates; or (ii) the family, whanau, or family group of that child or young person; and (d) any recommendation as to the course of action the care and protection co-ordinator might take in respect of the referral.
72 Section 22(1)(h) of CYFA1989
for child is not entitled to attend ‘family time’ unless allowed by the family. Therefore, whether the parents are cognisant that any decision they make in family time relating to the grounds for a declaration under FGC may have an impact upon them for any subsequent children they have, may influence their decision to allow a lawyer into family time. Lawyers representing parents are not entitled members. As a result, parents, during the course of an FGC, are not able to obtain legal advice about the implications of the grounds of the FGC, agreeing to those grounds and a declaration, and any future implications as a subsequent parent.

_Foodstuffs (Auckland) v Commerce Commission_ In addressing issues of non-retrospectivity, the Court of Appeal focused upon three provisions of the Interpretation Act 1999.

Section 7 states—

An enactment does not have retrospective effect.

Enactment is defined in section 29 of the Interpretation Act 1999 as—

enactment means the whole or a portion of an Act or regulation

The Interpretation Act 1999 also outlines how repeals are to be interpreted by the Courts. Specifically, section 17 states—

17 Effect of repeal generally

(1) The repeal of an enactment does not affect—
(a) the validity, invalidity, effect, or consequences of anything done or suffered:
(b) an existing right, interest, title, immunity, or duty:
(c) an existing status or capacity:
(d) an amendment made by the enactment to another enactment:
(e) the previous operation of the enactment or anything done or suffered under it.

Section 29 of the Interpretation Act 1999 defines a ‘repeal’ as—

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73 Section 22(2) of the Children Young Persons that Their Families Act 1989
74 Section 22 CYFA
75 [2002] 1 NZLR 353
in relation to an enactment, includes expiry, revocation, and replacement

Technically, section 18A is an ‘amendment’ as opposed to a ‘repeal. The repeal of a law differs from the amendment because an amendment involves making a change to the law that already exists, leaving a portion of the original law still standing. When an enactment is repealed, none of the previous law remains intact. However, the two terms are used synonymously. For example, when the Auckland District Law Society commented upon the introduction of the ‘anti-smacking law’, the Society used the term ‘repeal’ and ‘amendment’ interchangeably (Auckland District Law Society, 2005).

In *Foodstuffs*, the CA also considered whether a ‘repeal’ affected an existing right, interest, title, immunity, or duty of the appellant. In their ratio, the judges argued that the principle in section 7 can also be put ‘positively’, for example, that an enactment, in general, should only have prospective effect. The sentient point at issue was whether the Appellant is said to have ‘an existing right or interest’ at the time the repeal came into force. In their decision, the CA stated that “the distinction between substantive and procedural rights is not always decisive” (para. 15). In *Foodstuffs*, section 17 of the Interpretation Act 1999 was specifically related to ‘substantive matters’ as opposed to the complementary matter of the processes for completing them and enforcing them (para. 16). In terms of section 18A, this chapter argues that the right to parent subsequent children is a substantive issue and therefore comes within the jurisdiction of section 17 of the Interpretation Act 1999.

The Appellant was able to successfully argue that the second respondent did not have an existing “right or interest” under section 17 of the Interpretation Act 1999 at the time that section 47 (1) of the Commerce Act 1986 was enacted on 26 May 2001. The key argument this chapter advances is that section 18A contravenes either sections 17 (b) or (c) of the Interpretation Act 1999. The right to parent subsequent children is a fundamental right. The fact that this right can be abrogated based upon a legislative presumption of potential harm would appear to be fundamental breach of parental rights, such as those in section 16 and 17 of the COCA.

Section 16 and 17 of the COCA outlines the rights of guardians as—

> 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. 

Section 17 states: 

Child’s father and mother usually joint guardians... 

(4) On the death of the father or the mother, the surviving parent, if he or she was then a guardian of the child, is the sole guardian of the child. 

Although the parent-child relationship has changed over the centuries, the basic premise of natural guardianship has not significantly changed. The ratio in Foodstuff, however, establishes that a right needed to exist at the time of the breach. This chapter also argues that the breach occurred on 1 July 2016 when the section 18A amendment took force. On that date, due to past removal history or criminal convictions, both sets of subsequent parents had their rights and interests under COCA immediately abrogated by becoming classified as the ‘parent of a subsequent child’. If a restricted approach were adopted and it argued that their parental rights do not crystallise under sections 16 and 17 of COCA until they are actual parents of subsequent children, then reliance would need to be placed upon section 17 (c). Section 18A arguably abrogates a subsequent parent’s ‘status’ as a natural guardian when they become categorised as a

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76 Section 18B(1)(a) & (b).
‘subsequent parent’ on 1 July 2016 when section 18A took force. They are unable to enjoy their natural guardianship of subsequent children without a state intervention that has been triggered without the usual adjudicatory process being implemented.
Chapter 12: Stage four – potential outcomes for section 18B (1)(b)

Chapter 12 develops the analysis under stage four with a specific focus upon the second population of parents affected by the amendment – section 18B(1)(b). During the consultation process, the section 18B(1)(b) group of subsequent parents were described as those parents who have been found, on the balance of probabilities, to have committed a specified offence against children. This statement attracted significant controversy as no individual can be found, on the balance of probabilities, to have committed an offence. The requisite criminal standard has always been beyond reasonable doubt. By attributing civil standards towards criminal behaviour and then enacting a legal mechanism with the intent to prevent the potential risk of that behaviour being repeated, challenges in child protection practice and law are created that have potential significant repercussions for vulnerable families (Auckland District Law Society, 2013).

What is clear under section 18B(1)(b) is that a declaration that a child is in need of care and protection is the first requirement of the definition of a subsequent parent under section 18B(1)(b). Section 67 provides the grounds for a declaration as—

A court may, on application, where it is satisfied on any of the grounds specified in section 14(1) 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.

When the section 18A amendment was enacted, section 67 was also amended to give effect to the intent of section 18A. Subsection 67 (2) took force on 1 July 2016:

(2) However, on an application under section 18A(4)(a) or 18D in relation to a person to whom section 18A applies, if the court is satisfied that the subsequent child is in need of care or protection on the ground in section 14(1)(ba), it must make the declaration unless it is satisfied that the parent has demonstrated that he or she meets the requirements of section 18A(3).
Declaration and the Paramountcy Principle

It is immediately apparent following the enactment of section 18A that a section 18B(1)(b) subsequent parent assessment process, when compared with other ‘parents’ under CYFA1989, is significantly different. For example, under section 67(1), the court *may* make an application. In contrast to a subsequent parent, under section 67(2) the court *must* make a declaration. If a declaration is made under section 18A, subsequent parents are deprived of most of the principles under section 5(a)\(^77\)(b)\(^78\)(c)\(^79\)(e)\(^80\) and (g)\(^81\) because section 18A(6) makes it clear that no FGC is to be held before any application is made to the court. Furthermore, as outlined in chapter 7, the requirements under section 70 have been waived.\(^82\) Therefore, any of the principles that refer to family involvement in decision making or an opportunity for the family to be heard as a collective group is removed from a section 18A assessment. This singular focus upon a ‘child’s best interests’, to the exclusion of their family’s perspective, has attracted criticism over the years. For example, in *Puao te Ata Tu*, The Ministerial Advisory Committee (1988) was critical of professionals who demonstrated little understanding of the cultural or social implications of their attitudes or decisions (The Ministerial Advisory Committee, 1988; RCSP, 1988).

In February 1992, two years following the implementation of the CYFA1989, the paramountcy principle became subject to a “barrage of criticism”\(^\text{DSW, 1992, p. 5}\). In response, the Minister for Social Welfare, The Honourable Jenny Shipley, ordered a review of the new CYFA1989. The very first review item was the status of the

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\(^77\) 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

\(^78\) 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

\(^79\) 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

\(^80\) 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

\(^81\) the principle that decisions affecting a child or young person should be made by adopting a holistic approach that takes into consideration, without limitation, the child’s or young person’s age, identity, cultural connections, education, and health

\(^82\) Mandatory requirement for a FGC to be held before a declaration can be made.
paramountcy principle. The review was immediately critical of well-intentioned social workers using the paramountcy principal as the underlying legal rationale to remove children from their family unit. Similar to the theme expressed by *Puao Te Ata Tu*, the review recognised how Maori and Polynesian families felt deeply ‘hurt’ when decisions relating to their whanau were being made by non-Maori social workers who lacked an understanding of the cultural or social implications of their decisions (Ministerial Advisory Committee, 1998).

The review concluded it was social work practice that was the cause of the conflict between the ‘paramountcy principle’ and the other principles in the CYFA1989 (DSW, 1992). To reconcile the conflict between practice, which was dominated by the child’s best interests and those interests of their biological family:

“...an emphasis upon the family group decision making in the CYFA1989, there will be no perceived conflict with the interests of the child provided all the family members agree” (DSW, 1992, p. 10).

However, as this mechanism for family inclusion and decision making is removed from the section 18A process, then the earlier 1988 and 1992 criticisms raised in relation to culturally inappropriate practice and the unnecessary removal of Maori children from their family unit require reconsideration, academic scrutiny and further research.

**United Nations Convention on the Rights of the Child**

The paramountcy principle is consistent with the United Nations Convention on the Rights of the Child (UNCROC). Article 3(1) states:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

This paramountcy principle is reflected in other parts of the Convention. The Convention makes it clear that a ‘child’s best interests’ is the overriding principle that determines the interpretation of the Convention. For example, article 18 preserves the right of children to family life. Clause 1 states—

> States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the
upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

Although article 18 preserves a child’s right to family life, this is only if that right is consistent with the child’s best interests. Conflict occurs when a ‘child’s best interest’, such as those of a new-born baby, are interpreted by child protection social workers and associated professionals; and their interpretation is inconsistent with the family’s perspective of those interests.

CHILDREN IN CARE

The following table is reproduced from the Key Statistics, published by Child Youth and Family, to the year ended 30 June 2016.

**Percentage of Maori Children in Care in New Zealand, 2012-2016**

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<td>Percentage of Maori in care</td>
<td>52%</td>
<td>55%</td>
<td>56%</td>
<td>59%</td>
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Key Care Statistics, Child Youth and Family, 2016

From this data, Maori children are consistently disproportionately represented in care statistics for at least the last five years. Furthermore, this proportion is growing. As outlined above, racial or ethnic disproportionality is defined as the underrepresentation or overrepresentation of a racial or ethnic group compared with its percentage in the total population (Dettlaff & Rycraft, 2010). Closely related to the disproportionality concept is the disparity concept, defined as the unequal outcomes of one racial or ethnic group as compared with outcomes for another racial/ethnic group (Douglas & Walsh, 2013).

Obviously, these care statistics do not distinguish between the proportion of children in permanent care or those in temporary care arrangements. However, when looking at the requirements of section 18B(1)(b), the logical assumption can be made that there

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83 Such as those under a section 101 custody order; or a section 102 custody order
84 under a section 78 interim custody
may potentially be a disproportionate representation of Maori in the population of parents who are identified in section 18B(1)(b). Furthermore, Maori are also disproportionately represented within the criminal justice system. As a result, there may also be a disproportionate representation of Maori in the population of subsequent parents identified under section 18B(1)(a). The amendment only came into force on 1 July 2016 and as such, demographic data around subsequent parents is still in its infancy. Future research around the actual demographic data that comprises subsequent parents under both section 18B(1)(a) and section 18B(1)(b) will be required to determine the accuracy of this prediction.

Treaty of Waitangi & Bi-Culturalism

In its report, the New Zealand Parliament Constitutional Arrangements Committee (2005) argued that

New Zealand may be better served if it developed its capacity for paying systematic attention to constitutional issues as they arise. There is a risk at present that individual changes are sometimes made without sufficient appreciation, by Parliament and the public, that they have constitutional ramifications. (p. 9)

This chapter argues that the introduction of section 18A has potential constitutional ramifications that need to be considered. Given any representation of Maori under a section 18A assessment, the potential implications for these Maori families and their associated rights under the Treaty of Waitangi is briefly addressed.

The Lands case85 established that the Treaty has legally enforceable effect only when referred to in legislation. The Lands case was decided in 1987. Two years later, CYFA1989 was promulgated. The Constitutional Arrangements Committee (2005) observed that a Parliamentary drafting tendency developed that avoided making generic reference to the principles of the Treaty in legislation. Instead, a drafting practice developed that only made “vague and general references to the Treaty and its principles” (Constitutional Arrangements Committee, 2005, p. 19).

85 New Zealand Maori Council v Attorney-General
In the CYFA1989, there is no specific generic reference to the Treaty. However, section 7 of the Act outlines the statutory duties of the CE.

Section 7(2)(c) ensures, wherever possible, that all policies adopted by the department, and all services provided by the department—

- 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
- support the role of families, whanau, hapu, iwi, and family groups; and
- avoid the alienation of children and young persons from their family, whanau, hapu, iwi, and family group

Although Parliament has arguably made only oblique references to the Treaty and the principles contained within it, whether this is sufficient to import the full protection of the Treaty is uncertain.

Social Workers’ Code of Ethics

Currently, registration with the social workers’ registration board is not a mandatory requirement to work as a social worker in New Zealand. However, registration with the social workers’ registration board is a mandatory prerequisite for employment as a statutory social worker. Statutory social workers are therefore bound by the New Zealand social workers code of ethics, especially in relation to working with Maori.

Among other things, the code states—

[2.3] Members advocate social justice and principles of inclusion and choice for all members of society, having particular regard for disadvantaged minorities. They act to prevent and eliminate discrimination against any person or group based on age, beliefs, culture, gender, marital, legal or family status, intellectual, psychological and physical abilities, race, religion, sexual orientation, and social or economic status.

[2.4] To this end, members promote socially just policies, legislation, and improved social conditions, that encourage the development and just allocation of community resources. They also act to ensure that everyone has access to the existing resources, services and opportunities that they need.
Given the disproportionate representation of Maori children in care, and the overall
disparity in outcomes for Maori families, developing an awareness of the hidden
sources of social injustices, such as those potentially represented by the section 18A
amendment, is an ethical obligation for care and protection practitioners. Through
developing an awareness, potential pathways available for advocacy and challenge are
identified as the following analysis on the principle of equity and the use of family
whanau agreements for Maori highlight.

The Principle of Equity

In 1989, David Lange Prime Minister of New Zealand set out the five principles that the
government would abide by when dealing with issues that arise under the Treaty. These
principles are consistent with the Treaty and with observations made by the courts and
the Waitangi Tribunal. These principles are identified as the principle of government
(the kawangatanga principle), the principle of self-management (the rangatiratanga
principle), the principle of equality, and the principle of redress. In his commentary,
David Lange highlighted that the principles “are not an attempt to rewrite the Treaty”
(p1) but act as a guide to assist the government in making decisions with respect to the
Treaty.

In the Lands case, the CA accepted that “…the Treaty is a document relating to
fundamental rights, that is, should be interpreted widely and effectively and as a living
instrument taking account of the subsequent developments of international human
rights norms…” (pp. 655–6). As a result, the associated rights and privileges of British
subjects must therefore be interpreted in contemporary context by the acceptance of
international treaty obligations such as the International Rights of the Child.
Furthermore, the second aspect of the equality principle looks to the actual enjoyment
of social benefits, not merely legal equality. Where serious and persistent imbalances
exist between groups, in their actual enjoyment of social benefits such as health,
education or housing, the government should consider particular measures to
proactively redress the balance.

If, as predicted above, the population of subsequent parents under sections 18B(1)(b)
are predominately Maori, then the constitutional principle of equality as under the
Treaty of Waitangi and New Zealand’s International obligations cannot be said to be
met. As outlined throughout the thesis, a section 18A assessment limits or abrogates rather than positively enhances subsequent parents’ rights under the CYFA1989. As the Key Care Statistics from Child Youth and Family illustrates, a significant proportion of the children in care are disproportionately represented by Maori. As this thesis argues, the enactment of section 18A and the potential abrogation of associated parental and human rights can only contribute to further reducing social outcomes for Maori, rather than proactively enhancing them. This is direct contravention of the Treaty and the principle of equality. This chapter refers to the use of family whanau agreements in child protection practice to further illustrate this point.

Family Whanau Agreements

A family/whanau agreement is a written contract between the family/whānau and Child, Youth and Family to provide the minimum necessary level of intervention required to address concerns for a child or young person. Child Youth and Family describe Family Whanau agreements as—

an intervention that uses family/whānau strengths and resources to ensure that the child or young person’s needs are being met and they are being protected and cared for. A family/whanau agreement is established as an outcome of an investigation or child and family assessment when it is assessed that a family/whanau agreement will address the identified needs and the social worker has not formed a belief that the child or young person is in need of care or protection. (Family Whanau agreements, 2016).

It is clear from the description that family whanau agreements apply to families who ‘occupy’ the fringes of a care and protection intervention. There is not enough ‘concern’ to enable a practitioner to formulate a belief that a child is in need of care and protection, but at the same time, a practitioner is unable to conclude a section 15 investigation with a ‘No Further Action’ outcome. Family whanau agreements therefore allow a statutory practitioner to exercise uncertainty.

Up until 2011, the MSD published key statistics for the number of family whanau agreements that were entered into in one year. In 2011—the final year that these statistics were published—the Ministry of Social Development stated that a total of 4,526 family whanau agreements were signed (MSD, 2011). More importantly, when
family/whanau agreements are signed, the commentary in the key statistics stated that these agreements were more likely to involve Maori children (MSD, 2011).

Between 2006/2007 and 2010/2011, the proportion of family/whanau agreements signed that involved children or young people identified as Maori increased from 42% to 48% (MSD, 2011). The assumption can therefore be made that it is primarily Maori families that potentially exist at the fringes of a care and protection population; but family/whanau agreements are advantageous for them as they act as a filter, preventing them from entering into the main protective jurisdiction of CYFA1989. However, section 18A forces practitioners into binary decision making, thereby removing the ability for practitioners to exercise professional judgement around uncertainty. As a result, more Maori families may incur a declaration as a result of a section 18A assessment due to an individual practitioner’s preference for risk-averse practice. In direct breach of the principal of equity under the Treaty, section 18A has the potential to disadvantage Maori social outcomes. Currently, there is no available data to establish whether the trend of whanau agreements being entered into by Maori continued to increase over the next 5-year period. Furthermore, whether Maori social outcomes are directly disadvantaged by the introduction of section 18A will require further research.

**Convention on the Prevention and Punishment of the Crime of Genocide & The International Covenant on Civil and Political Rights**

The Genocide Convention criminalizes genocide and upholds the right of racial and other groups to exist as distinct groups. Article 2 of The Genocide convention defines genocide as “any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as”—

b) causing serious bodily or mental harm to members of the group.

This chapter argues section 18A comes dangerously close to breaching clause B of the Genocide Convention as it satisfies the ‘intent’ component of Article 2. This is especially true if the prediction relating to Maori disproportionality in the subsequent parent population is accurate. This argument is predicated entirely upon the retrospective effect of section 18A. The demographic characteristics and identities relating to the population of section 18B(1)(b) parents are only held by the Ministry of Social Development – a Crown agency. The most recent key statistics relating to children in
care illustrate a disproportionate representation of Maori children in care. If the population of section 18B(1)(b) parents is disproportionately represented by Maori, then the Crown has enacted legislation that they ‘know’ or ‘ought to have known’ would immediately apply disproportionately to Maori. Further research will be needed to identify the immediate demographics that comprise this group in order to determine whether clause B of the Genocide convention is triggered. In particular, determining whether a disproportionate number of subsequent children who are taken into care as a result of a section 18A assessment identify as Maori would also need to be determined.

Thornerby (1991) states the motivation to include this provision in the Genocide Convention was in recognition that—

...the separation of children from their parents [and culture] results in forcing upon the former at an impressionable and receptive age a culture and mentality different from their parents. This process tends to bring about the disappearance of the group as a culture unit in a relatively short time. (Thornerby, 1991)

This approach under Article 2 of the Genocide Convention is reflected in Article 27 of the International Covenant on Civil and Political Rights. Article 27 states—

Persons belonging to ...minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Article 27 has been that typically regarded as implying solely "negative rights", that is, the right must not be denied. However, the Commission on Human Rights have taken the view that 'positive means' of protection are also required. The Committee outlined that 'positive means' may require "positive legal measures of protection and measures to ensure that effective participation of members of minority communities in decisions that affect them" (Baxter, 1998, p. 141). The commentary from the Human Rights Committee would indicate that more positive actions need to be implemented than previously thought. For example, in terms of a section 18A assessment, Maori families should be included in any decision making relating to Maori subsequent children. In completely excluding the FGC process from a section 18A assessment, it would appear that a section 18A assessment breaches article 27 of the International Covenant on civil
and political rights, article 2 of the Convention on the Prevention and Punishment of the
Crime of Genocide and article 19 of UNCROC for a child’s right to family life.

The ‘mental harm’ that Maori subsequent parents are potentially exposed to as a result
of a section 18A assessment can only be assumed. Broadhurst et al. (2015) highlights
the consistent “fear” that “haunts” (p. 2242) women who have had one removal during
their experiences of subsequent pregnancies. In her qualitative research focus on the
experiences of women who have experienced multiple removals, Broadhurst and Mason
(2013) describe this population of women as a “maternal outcasts… who bear the
stigma of spoiled motherhood (p. 291). In more recent research, Broadhurst et al.
(2015) further defines this group of ‘maternal outcasts’ as “firmly on the outside” (p.
303). Pence (2011) argues that “trauma in child maltreatment forensic investigations
and the worker’s role in anticipating and mitigating the effects of trauma during the
investigative process is rarely addressed in the trauma-informed literature” (p. 49). For
subsequent children and their families, it is critical that practice avoids “triggering
memories and reactions associated with past traumas from previous interventions or
removals” (Pence, 2011, p. 52). Therefore, further research around the specific potential
trauma and mental harm that a subsequent parent may experience will be important to
ensure the development of safe practice specifically around a subsequent child and their
families.

United Nations Convention on the Rights of the Child

Article 2 – International Convention on the Rights of the Child

Clause 1 & 2 of article 2 state—

1. States Parties shall respect and ensure the rights set forth in the present
Convention to each child within their jurisdiction without discrimination
of any kind, irrespective of the child’s or his or her parent’s or legal
guardian’s race, colour, sex, language, religion, political or other opinion,
national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the
child is protected against all forms of discrimination or punishment on the
basis of the status, activities, expressed opinions, or beliefs of the child’s
parents, legal guardians, or family members.

In relation to non-discrimination, the marginal note in the Convention states—
“...it is the State's obligation to protect children from any forms of discrimination and to take positive action to promote their rights.”

Clause one of the Convention highlights that a child should not be discriminated against in terms of their parent’s *ethnicity or other status*. Section 18A defines a ‘subsequent child’ as a child who has a parent identified in section 18B. Therefore, if a subsequent child has a parent with a criminal conviction\(^{86}\) or a parent who has had a child previously removed from them, they are immediately treated differently than other children who are subject to the CYFA1989. For other children, a notification is needed before the adjudicatory phase, and if necessary, a dispositional phase is triggered. Furthermore, as outlined above, the usual adjudicatory phase under section 18A has been significantly bridged. Therefore, section 18A ‘subsequent children’ as opposed to other ‘children’ under CYFA1989 are treated differently and arguably, subject to a more onerous process based entirely upon the *status* of their parents.

Furthermore, if a narrow interpretation of ‘parent’ is adopted, then only biological children or children whose families are involved in de facto arrangements will be defined as a ‘subsequent child’. This can lead to the situation where subsequent parents are involved in informal care arrangements of other children; but these children will escape a section 18A definition of subsequent child. This therefore leads to a discriminatory situation where children can be in identical contexts but be treated differently and defined differently, based entirely upon the status or the domestic arrangement of their biological parent. This is a particularly complex scenario if a parent unwittingly and unknowingly enters into a domestic arrangement with a person who meets one of the criteria identified in section 18B. Their own child, who may never have had any interaction with the CYFA1989 previously, is suddenly defined as a subsequent child, labelled as ‘high risk’, and automatically subject to the preventative jurisdiction established under section 18A. Currently, it is unknown what stigmatising effect being labelled as a ‘subsequent child’ will have upon children. Exploring this area of research will be important moving forward.

\(^{86}\) Murder, manslaughter or infanticide
Chapter 13: Stage four – constitutional and human rights issues

Constitutional Issues

Chapter 13 finalises the stage four analysis with a focus upon important constitutional and rights issues. As outlined earlier, the contrasts between the four groups of parents are accentuated, which is attributable to their unique chronological and political differences. For example, when the colonisation statutes of both Australia and New Zealand were enacted, international conventions such as the Genocide Convention and the International Convention on the Rights of the Child had not been promulgated. The International political arena is therefore of particular significance to the two groups of parents identified under section 18A. Furthermore, Maori had the additional support of the treaty, another significant distinguishing feature of the constitutional context within which New Zealand child protection law is developed.

These four groups of parents are geographically, politically and chronologically isolated, but nevertheless are bound together through the operation of a legal mechanism designed to prevent the risk of potential maltreatment that society has deemed them to represent to children in their care. Through this analysis, the highly vulnerable characteristics of all these groups of parents is accentuated, as similarities between them are established.

Furthermore, there are fundamental constitutional differences between Australia and New Zealand that makes this final stage of the framework the distinguishing feature between the two countries. The term constitution refers to the institutions, practices and principles that define and structure a political system and the written document that establishes, codifies and articulates such a system (New Zealand Parliament Constitutional Arrangements Committee, 2005). Australia has a constitution in the first sense. This is in direct contrast to New Zealand whose constitution is partly written and wholly uncodified (Budge, Crewe, McKay, & Newton, 2001). New Zealand’s constitution is composed of unwritten constitutional conventions, precedents, royal prerogatives and custom. Of those parts that are written, The Treaty of Waitangi Act 1975 and the NZBORA and their interaction with section 18A forms a significant focus of this thesis.

Aboriginal children who experienced systematic processes of separation from family and homeland became known as the "Stolen Generations" (Buti, 2004). In Australia,
indigenous children are 10 times more likely than other children to be subject to some kind of child protection order (O’Donnell et al., 2010). In a recent qualitative study of family lawyers in Queensland, Douglas and Walsh (2013) found that a common theme from the participants’ perception is that this disproportionate representation of indigenous people in child protection interventions was directly related to “the colonisation process, including past removal policies and practice and the resulting loss of identity” (p. 60). Despite acknowledgement and recognition of the disastrous consequences for Aboriginal families as the result of the implementation of these legal mechanisms, the ‘best interest of the child’ rationale has represented a significant barrier for Aboriginal people to obtain redress for the significant negative social outcomes that the removal policies caused during colonisation. The Crown has escaped liability on the basis that the Director of Native Affairs has been given independent discretion to act on the best interests of the child and not on the view of the relevant Minister of the Commonwealth. With its recent enactment, how section 18A interacts directly with the international political human rights climate and with New Zealand’s own partly written and wholly uncodified constitutional makeup, especially with the operation of the NZBORA and the Treaty, is important moving forward.

Trauma and statutory removal

When comparing the characteristics of the New Zealand and Australian Aboriginal parents targeted during colonisation and parents described under section 18B(1)(b), all these three population of parents are bound together by the trauma associated with statutory removal. Broadhurst and Mason (2013) highlight that mothers who have been subject to multiple removals experience macro-level discrimination by the lack of policy agenda that is responsive to their needs post removal. Broadhurst and Mason (2013) therefore recommend a more preventative focus for this group of vulnerable adults is needed in the future. It is feasible that the parents identified under section 18B(1)(a) may never have experienced the statutory removal of a child. Parents identified under section 18B(1)(a) exhibit a different ‘trauma profile’ than the parents targeted during colonisation or those parents identified under section 18B(1)(b). Their trauma is

87 Cubillo Trial (2000) 103 FCR 1, 348-349
arguably the result of the grief that they have experienced from the death of a child with whom they most likely developed a significant attachment.

**Stigma and professional decision making**

Broadhurst and Mason's (2013) study into mothers who experience successive removals is particularly relevant for section 18A’s enactment. Broadhurst and Mason (2013) describe mothers who have had successive removals as maternal outcasts “who bare the stigma of a spoiled identity” (p. 292). For Kedell (2016) creating additional stigma for already stigmatised populations “reinforces existing structural inequalities” (p. 76). Dobson (2007) argues that the stigma towards Aborigines that was evident during colonisation, is still so pervasive in contemporary practice that the separation policies in operation during colonisation are continued “by stealth” (p. 85). While focussing upon early prevention is regarded as being in the child’s best interests, Munro et al. (2014) highlight the importance of ensuring that “individual families are not stigmatised on the basis that they have some characteristics that form part of a causal chain leading to being abusive” (p. 70).

**Stigma**

Goffman (1974) argues that contemporary society use stigma to create social identities that are ultimately disparaging, demoralising and dehumanising. For Goffman (1974) stigmatised individuals or groups are characterised with an undesired differentness from normality.

“As a result, we exercise varieties of discrimination, through which effectively, often unthinkingly, reduce the individual's life chances” (Goffman 1974, p. 15).

Although the offending behaviour identified by subsequent parents under section 18B(1)(a) demonstrates a clear child abuse aetiology, the research is also clear that this type of fatality is exceedingly rare (New Zealand Department of CYF, 2006). Nevertheless, some of the ‘offenders’ identified in section 18B(1)(a) would have attracted considerable media interest at the time of their offending. For this group of subsequent parents, Feng et al. (2012) identifies stigma as a particularly acute problem because there is no media control over publication of names, pictures of victims and perpetrators, which creates shame and disgrace. Furthermore, this group of offenders,
having been identified through offending history, is juxtaposed within an enactment with a second group of subsequent parents identified under section 18B(1)(b), thus creating an implicit association. At such an early stage of the amendment, this subtle approach in the drafting of section 18A requires particular scrutiny. As Feng et al. (2012) state "child protection law represents a societal value" (p. 277). This chapter argues that such a subtle approach in parliamentary drafting is signalling a social value where the subsequent parents targeted under section 18B(1)(b) are ‘guilty by association’ with those parents identified under section 18B(1)(a). As a strong connection between section 18B(1)(a) parents and abuse is made, a similar connection is arguably implied between abuse and subsequent parents identified under section 18B(1)(b) based upon the drafting of the amendment. The influence of stigma on professional attitudes towards subsequent parents, and how this may impact upon practice decision making, requires future research.

Building on Goffman’s (1974) work, Easter (2012) developed a bi-social model of stigma: ‘volitional’ and ‘non-volitional’ stigma. First, non-volitional stigma refers to behaviour that is perceived as involuntary, that is, because of a disability or mental illness. Second, volitional stigma arises when behaviour is interpreted as an ongoing voluntary behavioural choice. The main difference between these two types of stigma is that the latter involves an individual to be judged by normal behavioural standards. Therefore, those who are judged under a volitional standard are regarded as morally bad (Easter, 2012). In stark contrast, those who are judged under the stigma of a mental illness incur “discrimination based on negative stereotypes” (Easter, 2012, p. 1409).

Leech and Dias (2012) argue that women often face stronger stigma associated with behaviour that is regarded as volitional or voluntary. As a result, women suffer more severe social implications such as a greater restriction on social and economic capital. In relation to volitional stigma, a strong parallel between mothers who were targeted during New Zealand’s colonisation and section 18B(1)(b) can be drawn. For example, illegitimacy was regarded as a behavioural choice by ‘morally corrupt women’. Likewise, consistent with the observation above by Leech and Dias (2012), this stigma attached to women during colonisation is evident in section 18A.

Section 18A(3)(a) states—
Section 18A(3) therefore exhibits an underlying discriminatory attitude towards victims of domestic violence who fail (i.e., omission) to act to prevent incidences of violence and allow the abuse to occur. Given the majority of domestic violence victims are women, section 18A therefore reflects a similar gender bias as the early New Zealand colonial protection statutes.

Laing (2016) also observes how legislative frameworks contain an embedded dominant discourse that is highly sceptical of women’s allegations of violence. In addition, Laing (2016) argues the Family Court system responsible for perpetuating ‘secondary victimisation,’ defined as the betrayal domestic violence survivors experience when they encounter “victim-blaming attitudes” (Laing, 2016, p. 3). The ‘volitional stigma’, driven by what (Warner, 2015) describes as emotional politics, is so persuasive that amendments such as section 18A and the associated potential abrogation of constitutional and parental rights, become justifiable.

CONCLUSION

The development of child protection law and practice in New Zealand has been subject to protracted cycles of crisis and reform. Section 18A was enacted on 1 July 2016 as part of a reform process. This thesis highlights that although contemporary child protection law is characterised by forensic investigative responses, section 18A adopts a preventative focus by targeting parents who represent a high risk of harm to subsequent children in their care. Section 18A therefore introduces a new conceptual client into social work practice called a subsequent child. The political context that influenced section 18A’s enactment, although isolated in a moment in time, will remain influential until another reform cycle repeals or amends section 18A in its current form. This thesis therefore analysed this critical period of reform given the potentially significant influence this context will continue to exert on statutory social work practice for the foreseeable future. However, as outlined above, this reform had the capacity to provide the section 18A amendment with considerable traction that facilitated its enactment quickly and without significant academic debate or consultation. Given this
knowledge gap, this thesis developed a 5-staged conceptual framework for legislative mechanisms that adopt a preventative maltreatment approach to demonstrate how the use of such mechanisms are fraught with challenges that may result in disastrous outcomes for vulnerable populations when they are used inappropriately or inadequately. An approach that is potentially being replicated by the enactment of section 18A.

The framework identified key characteristics that are associated with mechanisms such as section 18A. The importance of identifying key legal and theoretical rationales that underpin the implementation of the mechanism. For section 18A and the colonial statutes, the 'best interest of the child' legal rationale that emerged during colonisation is still pivotal in contemporary practice. The challenges associated with the theoretical rationale such as the use of substantiation data and criminal history to identify parents who are regarded as a high risk of potential maltreatment under section 18A was also highlighted. The practical challenges involved in the physical identifications the children who are under the protective jurisdiction of these mechanism is also explored. Of particular focus is the jurisdictional expansion of an unborn child within the definition of a subsequent child. The use of presumptions and a reverse onus of proof in a legal and practice context are also explored. For example, the implications for a social worker when using propensity evidence to inform assessments under section 18A is highlighted as propensity evidence has particular challenges in reaction to decision making bias which is well recognised in legal research. The conceptual framework identified the interpretational challenges relating to the definition of subsequent child and the parent of a subsequent child. Furthermore, the differences between the substantive jurisdiction of the Act and the assessment process under section 18A was highlighted. The thesis concluded by highlighting that historically, human rights and constitutional issues have always been recognised as representing particular challenges for the use of these mechanisms in the colonisation statutes that were enacted in both New Zealand and Australia. Therefore, identifying whether there are specific human rights and constitutional issues associated with the section 18A enactment was examined.
Chapter 14: future research implications

Throughout the thesis, important areas of future research were highlighted. First, consistent with the observations from the Legislative Advisory Committee (2013), more research into the potential rights by all those that are affected; both domestically and internationally; needs to be given focus in the future, given this body of reform. One key rights issue identified in the chapter is whether section 18A abrogates the right to be protected against retrospective legislation for parents of subsequent children under section 18B(1)(a). Another related research area is to determine whether parents of subsequent children, defined in section 18B(1)(a), attract the privilege against self-incrimination.

One particular important area of future research is whether the practice tools that have been developed in response to one particular legislative purpose are able to be effectively utilised when a different statutory purpose is enacted. For example, how the role of a statutory social worker has evolved under section 18A in statutory care and protection practice is recommended. The jurisdiction established by section 18A is only in its infancy; future amendments could potentially expand (or contract) this jurisdiction depending upon societies appetite for risk or, as previous chapters have highlighted, the level of emotional politics that are leveraged off serious child abuse fatalities that attract media attention. Ensuring future social practice evolves with the preventative jurisdiction established under section 18A will be an important consideration in the future.

Examining some of the specific interpretation issues relating to section 18A will be important from a legal perspective. As chapter 10 highlights, from what stage of pregnancy does a section 18A jurisdiction apply? Establishing clarity around this issue will be an important interpretative issue moving forward. Another important interpretative issue to address relates to informal care arrangements. For example, do practitioners regard informal care arrangements that represent a risk of abuse as a care and protection concern for the caregiver/parent who had the “right of possession;” a failure to protect issue? Closely related to this theme, section 18A 3(a) and (b) refers to allowing the kind of harm that led to the parent being a person described in Section 18B. From a practice perspective, this new body of reform under section 18A assumes that
whatever happened, the parent ‘allowed it’. As the chapter outlines, this is highly problematic if domestic violence notifications are considered. Therefore, future gendered analysis research of how this aspect of a section 18A assessment is required, to ensure the knowledge base around child protection practice does not become unnecessarily discriminatory towards women.

The amendment only came into force on 1 July 2016 and as such, demographic data around subsequent parents is still in its infancy. Future critical research around the actual demographic data that comprises subsequent parents under both section 18B(1)(a) and section 18B(1)(b) will be required to identify the demographics of the population that is directly affected by the section 18A enactment. This will be important in relation to issues relating to Maori and the Treaty.
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