

# Reconstructing State Intervention in Pregnancy to Empower New Zealand Women

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**ABSTRACT:** Over the last twenty years, New Zealand courts have extended the State’s child protection powers to the fetus as an “unborn child.” The child care and protection agency, Oranga Tamariki, purports to protect children, but its oversight regulates pregnant *women’s* choices about how they run their lives and what they do with their bodies. This Note argues for a reconstruction of State intervention in pregnancy to empower pregnant women’s fully autonomous decision making and provide the social conditions and resources to support family life.

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## INTRODUCTION

State child protection agencies have a vexed relationship with pregnancy. The vexed relationship arises from the paradox of pregnancy raising two subjects of State interest: a present pregnant woman and a future child. In this moment of paradox, pregnancy can be a positive opportunity for the State to support pregnant women to prepare for wanted, healthy pregnancies and stable parenting relationships. Equally, pregnancy can be a site of pernicious State regulation that restricts a pregnant woman’s ability to make decisions about her own life and imposes a government standard for family life that excludes women who fall outside white middle-class norms of “good” motherhood.

The promise and peril in State intervention is illustrated by the work of New Zealand’s new government agency for children and young people, Oranga Tamariki—Ministry for Children. In 2017, Oranga Tamariki replaced the former government agency for child protection services, Child, Youth and Family, after an Expert Advisory Panel found the agency was failing to meet the needs of children and young people.<sup>1</sup> Oranga Tamariki aims to build a child-centered, investment approach to working with children and young people. The Ministry intends to replace the traditional “crisis response” model for child protection services with a system “focused on prevention and early intervention, with the aim of having fewer children moving through the system and into care.”<sup>2</sup> Critically, this investment model is built on “high aspirations” for tamariki Māori (Māori children and young people).<sup>3</sup>

In the new “investment model,” prevention and early intervention begin with pregnancy. Oranga Tamariki sees pre-birth as a “unique opportunity” to work

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1. Modernising Child, Youth and Family Expert Panel, Expert Panel Final Report: Investing in New Zealand’s Children and their Families 20 (2015) [hereinafter Final Report]; see also Cabinet Social Policy Committee Minute of Decision “Organisational Form to Support the New Operating Model for Vulnerable Children.”

2. *What We Do*, ORANGA TAMARIKI, <https://www.orangatamariki.govt.nz/about-us/what-we-do> [https://perma.cc/NNQ8-PFL2].

3. FINAL REPORT, *supra* note 1, at 11; and *Who We Are*, ORANGA TAMARIKI, <https://www.orangatamariki.govt.nz/about-us/overview/> [https://perma.cc/FRL9-JFY8].

with families, whānau<sup>4</sup> and other professionals to assess parenting capacity, determine a family's needs and implement a plan that will secure the immediate safety of the newborn infant and its “brightest future.”<sup>5</sup> The pre-birth practice framework is supported by a line of New Zealand cases holding that the agency is empowered to investigate reports of concern for an “unborn child” and apply to the courts for statutory orders over that “unborn child.”<sup>6</sup>

Oranga Tamariki is a part of New Zealand's broader efforts to rectify a shameful record of neglecting certain groups of children's wellbeing and make New Zealand “the best place in the world to be a child.”<sup>7</sup> In 2016, New Zealand's child poverty monitor found 27 percent of New Zealand children lived in households experiencing income poverty and seven percent lived in severe poverty.<sup>8</sup> Almost one in four New Zealand children have been subject to at least one report to child protective services by age seventeen and around one in ten have suffered abuse or neglect.<sup>9</sup> While Indigenous Māori are found at all levels of socio-economic status in New Zealand,<sup>10</sup> Māori children experience significantly higher rates of deprivation and disadvantage than New Zealand European children. Māori children are twice as likely as non-Māori to live in food insecure households and have significantly higher rates of mortality and hospitalization for medical conditions.<sup>11</sup>

New Zealand's contemporary efforts to address child poverty are anchored in its context of colonization. In New Zealand's colonial history, the Crown alienated Indigenous Māori land and resources and undermined the Māori

4. “Whānau” is the Māori concept of an extended family or family group, or “a multigenerational collective made up of many households that are supported and strengthened by a wider network of relation” *Whānau*, MĀORI DICTIONARY, <https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=whanau> [<https://perma.cc/7YXJ-HEBL>]; *see also* FIONA CRAM, FAMILIES COMMISSION—KŌMIHANA Ā WHĀNAU, SAFETY OF SUBSEQUENT CHILDREN: MĀORI CHILDREN AND WHĀNAU 11 (2012).

5. ORANGA TAMARIKI PRACTICE CENTRE, STRENGTHENING OUR RESPONSE TO UNBORN BABIES, <https://practice.orangatamariki.govt.nz/policy/assessment-and-decisionmaking/key-information/strengthening-our-response-to-unborn-babies/> [<https://perma.cc/C4YN-V7W5>].

6. *See, e.g., In the matter of Baby P (an unborn child)* [1995] NZFLR 577 (FC); *Re an Unborn Child* [2003] 1 NZLR 115 (HC); *L v. Chief Executive Oranga Tamariki—Ministry for Vulnerable Children* [2018] NZHC 1420.

7. Jacinda Ardern, 40th Prime Minister of New Zealand, Speech to 9th Annual Social Good Summit (Sept. 24, 2018), <https://perma.cc/D5K5-HKNY>. *See also* NEW ZEALAND GOVERNMENT, OUR PLAN: THE GOVERNMENT'S PRIORITIES FOR NEW ZEALAND, <https://www.beehive.govt.nz/sites/default/files/2018-09/Our%20Plan.pdf> [<https://perma.cc/LE78-9LMC>].

8. M. DUNCANSON ET AL., NEW ZEALAND CHILD AND YOUTH EPIDEMIOLOGY SERVICE, CHILD POVERTY MONITOR: TECHNICAL REPORT 3 (2017). The 2018 report of the Child Poverty Monitor did not include updated income poverty rates due to issues relating to sample size.

9. Bénédicte Rouland & Rhema Vaithianathan, *Cumulative Prevalence of Maltreatment Among New Zealand Children, 1998-2015*, 108 AM. J. PUB. HEALTH 511, 512 (2018).

10. *See* EXPERT ADVISORY GROUP ON SOLUTIONS TO CHILD POVERTY, WORKING PAPER NO. 14: REDUCING CHILD POVERTY IN MĀORI WHĀNAU 1 (2012), <https://www.occ.org.nz/assets/Uploads/EAG/Working-papers/No-14-Reducing-poverty-in-Maori-children.pdf> [<https://perma.cc/PVV7-SKXT>].

11. *See* M. DUNCANSON ET AL., NEW ZEALAND CHILD AND YOUTH EPIDEMIOLOGY SERVICE, UNIVERSITY OF OTAGO, DUNEDIN, CHILD POVERTY MONITOR TECHNICAL REPORT (2018), <http://www.nzchildren.co.nz/> [<https://perma.cc/25M5-RVVS>].

cultural, spiritual and economic base. New Zealand's policies, institutions and infrastructure are steeped with notions of Māori inferiority and Pākehā (New Zealand European) superiority.<sup>12</sup> The legacy of colonization is "the differential distribution of social, political, environmental and economic resources and wellbeing . . . with Māori bearing the brunt of disparities."<sup>13</sup>

This Note argues that extending the State's discretionary child protection powers to the fetus as an "unborn child" in New Zealand's environment of structural inequality and colonial oppression perversely acts to constrain the rights and interests of the very women the State has an obligation to empower. I contend that the State should not abandon pregnancy intervention, but reconstruct interventions in line with an affirmative concept of the right to privacy emphasizing the duty of the State to provide social conditions and resources to support pregnant women's fully autonomous decision making.

The Note begins in Part I by tracing how the New Zealand courts have found the State's child care and protection powers extend to protect the "unborn child" from harm. I outline how Oranga Tamariki pursues this accepted State interest in the "unborn child" through an intensive investment model that prioritizes prevention and early intervention services beginning before birth. Part II argues that framing the fetus as an "unborn child" has served to obscure pregnant women and drive State intervention.

Part III demonstrates that applying the construct of the "unborn child" in the context of New Zealand's structural inequality, colonial oppression, and dominant white middle-class notions of family and motherhood disproportionately impacts Māori women and women experiencing poverty. Part IV highlights the perversity of the State interventions constraining rather than empowering pregnant women. At the individual level, State oversight infringes a woman's right to privacy. At the collective level, the unequal State oversight imposes an invidious standard for family life and distracts the public from the broader State supports required for all to improve children's wellbeing.

Part V argues for a reconstruction of pregnancy intervention to empower all pregnant women and support families. Two core features of traditional child protection services, the paramountcy principle and the child rescue model, are fundamentally incompatible with the autonomy of pregnant women. While this structure endures, New Zealand will be unable to achieve positive, empowering intervention within the child protection branch. However, the State's vexed relationship with pregnant women cannot be resolved by the State withdrawing from pregnancy altogether. Reconstruction of State intervention is supported by

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12. See Fiona Cram, *Poverty*, in MĀORI AND SOCIAL ISSUES 156, 156 (Tracey McIntosh & Malcolm Mulholland eds., 2011.) "Pākehā" is a term used to describe New Zealanders of European descent: *Pākehā* MĀORI DICTIONARY, <https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=pakeha> [https://perma.cc/A6PD-CLPZ].

13. *Id.* at 156.

an affirmative concept of the right to privacy, reproductive justice, the Crown's obligations under Te Tiriti o Waitangi,<sup>14</sup> and New Zealand's international treaty obligations to support family life.<sup>15</sup>

### I. NEW ZEALAND EXTENDS CHILD CARE AND PROTECTION POWERS TO THE "UNBORN CHILD"

From 2017 to 2018, Oranga Tamariki received 1,949 separate reports of concern that an "unborn child" in New Zealand had been, or was likely to be, harmed, ill-treated, abused, or neglected.<sup>16</sup> Oranga Tamariki took further care and protection action on 1,235 of these reports of concern and obtained custody orders for a total of 125 unborn children in New Zealand during that year.<sup>17</sup> This part traces how New Zealand came to extend its broad, discretionary child protection powers to the fetus as the "unborn child" and how this extension has served to obscure the interests of pregnant women in New Zealand.

#### A. *New Zealand's Mission to Invest in Children and Young People*

Oranga Tamariki carries the flag for New Zealand's mission to invest in its children and young people. The 2017 establishment of Oranga Tamariki, and associated amendments to statutory child protection powers, followed a decades-long struggle over how to ensure the child protection system meets the needs of all children and families in New Zealand.<sup>18</sup>

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14. In 1840, representatives of the British Crown signed Te Tiriti o Waitangi, or the Treaty of Waitangi, with representatives of iwi/tribal groups. The Treaty is New Zealand's founding constitutional document and was meant to create a partnership between Māori and the British Crown that affirmed Māori sovereignty and guaranteed collective rights to land and resources. Te Tiriti o Waitangi 1840; *see also* Claire Charters & Tracey Whare, *Shaky Foundations: The Fundamental Flaw at the Heart of a "Model" Treaty Involving New Zealand and the Indigenous Māori Community*, 34 *WORLD POLICY J.* 11, 11 (2017).

15. Convention on the Rights of the Child, 1577 U.N.T.S. (ratified 6 April 1993).

16. Letter from Steve Groom, Gen. Manager Pub., Ministerial and Executive Services Oranga Tamariki, to Ministry for Children (Jan. 29, 2019).

17. *Id.* Oranga Tamariki initiated a "partnered response" for a further 129 reports that did not meet the statutory threshold for care and protection but required "family focused case management." The custody orders figure includes custody orders under ss 78, 101, 102, 110(2)(a), and 140 of the Oranga Tamariki Act.

18. State Sector (Ministry for Vulnerable Children, Oranga Tamariki) Order 2016 (N.Z.). When first established, the Ministry was called the "Ministry for Vulnerable Children, Oranga Tamariki." The name was amended to "Oranga Tamariki—Ministry for Children" from January 18, 2018, following a public debate about the stigma of the word "vulnerable." *See, e.g.,* Craig McCulloch, *'Vulnerable' dropped from Children's Ministry name*, RADIO NEW ZEALAND (Dec. 11, 2017), <https://www.radionz.co.nz/news/political/345957/vulnerable-dropped-from-children-s-ministry-name> [<https://perma.cc/229E-Y5YB>]. The former agency for child protection services—Child, Youth and Family—had been reviewed almost continuously since 1988, including 14 restructures between 1998 and 2008. *See* MODERNISING CHILD, YOUTH AND FAMILY EXPERT PANEL, MODERNISING CHILD, YOUTH AND FAMILY EXPERT PANEL: INTERIM REPORT 6 (2015) [hereinafter INTERIM REPORT], <https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/evaluation/modernising-cyf/interim-report-expert-panel.pdf> [<https://perma.cc/2V8Z-VQ7S>].

New Zealand's Children's Commissioner, Judge Andrew Becroft, diagnosed Child, Youth and Family's core problem as a failure to understand and seize the opportunity for radical change laid down in its governing Act, the Children, Young Persons, and Their Families Act 1989.<sup>19</sup> The opportunity was to embrace the Māori worldview and pivot powers on children's wellbeing as members of their broader whānau, hapu, iwi, and family groups.<sup>20</sup> This radical vision was an answer to the groundbreaking 1988 Puaoteatatu (Daybreak) report, which called out the insidious and destructive institutional racism in the monocultural services of the Department.<sup>21</sup> Puaoteatatu underlined the system's "profound misunderstanding or ignorance of the place of the child in Maori society."<sup>22</sup> Despite the 1989 Act's opening for change, a focus on traditional Pākehā family structures has continued to permeate the practice of social work.

Concerns about Child, Youth and Family's performance and impact on vulnerable children culminated in the April 2015 appointment of an independent expert panel to lead a "complete overhaul" of the agency.<sup>23</sup> The Modernising Child, Youth and Family Panel found the care and protection system focused on managing immediate risk and containing short-term costs instead of working to support "better lives" for children in the long-term.<sup>24</sup> Overall, children in contact with the system had significantly worse health, education and incarceration outcomes as young adults than their peers who had had no contact with Child,

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19. OFFICE OF THE CHILDREN'S COMM'R, MAIEA TE TŪRUAPŌ, FULFILLING THE VISION: SUPPORTING YOUNG PEOPLE WITH AT-RISK BEHAVIOUR TO LIVE SUCCESSFULLY IN THEIR COMMUNITIES 5 (2018).

20. Children, Young Persons, and Their Families Act 1989 (N.Z.) [hereinafter the "1989 Act"]. "Family group" is defined in the 1989 Act to mean an extended family with at least one adult member "with whom the child or young person has a biological or legal relationship" or "to whom the child or young person has a significant psychological attachment," or that is the child's or young person's whānau or other culturally recognized family groups." *Id.* at pt. 2(1). In general, "Iwi" is defined as an "extended kinship group, tribe, nation, people, nationality, race – often refers to a large group of people descended from a common ancestor and associated with a distinct territory." IWI, MĀORI DICTIONARY, <https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=iwi> [https://perma.cc/4VPR-YPCL]. "Hapū" is defined as a "kinship group, clan, tribe, subtribe – section of a large kinship group and the primary political unit in traditional Māori society." In traditional society a hapū "consisted of a number of whānau sharing descent from a common ancestor" and "[a] number of related hapū usually shared adjacent territories forming a looser tribal federation (iwi)." HAPŪ, MĀORI DICTIONARY, <https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=hapu> [https://perma.cc/WL7L-CVVT].

21. THE MAORI PERSPECTIVE ADVISORY COMM., PUAOTEATATU (DAY BREAK): THE REPORT OF THE MINISTERIAL ADVISORY COMMITTEE ON A MAORI PERSPECTIVE FOR THE DEPARTMENT OF SOCIAL WELFARE 19 (1988), <https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/archive/1988-puaoteatatu.pdf> [https://perma.cc/Z8LC-5C6U].

22. *Id.* at 7.

23. INTERIM REPORT, *supra* note 18, at 5; *Independent Expert Panel to Lead Major CYF Overhaul*, NEW ZEALAND GOV'T (Apr. 2, 2015), <https://www.beehive.govt.nz/release/independent-expert-panel-lead-major-cyf-overhaul> [https://perma.cc/6XVA-GELC].

24. INTERIM REPORT, *supra* note 18, at 79.

Youth and Family.<sup>25</sup> Children who had been in the care of Child, Youth and Family experienced re-abuse and re-victimization at an appalling rate, with anecdotal evidence of significant victimization of children while they were in the State's care.<sup>26</sup> The Panel recommended a bold overhaul to shift the system's focus to the child and their need for a stable and loving home.<sup>27</sup> The recommended changes included establishing a new department (now Oranga Tamariki) as a single point of accountability with an expanded mandate to support long-term outcomes.<sup>28</sup>

Oranga Tamariki is defined by a child-centered "investment approach" to protective services.<sup>29</sup> The investment approach looks to future long-term outcomes of public spending and services and relies increasingly on data to measure returns on those investments.<sup>30</sup> The approach favors an intense delivery of child protection services at the earliest possible opportunity with two payoffs in mind: first, the social benefits of improved life outcomes for children in contact with the service; and second, the fiscal benefits to the State through avoided lifetime costs in the social welfare, justice and health systems and productivity gain in the private sphere.<sup>31</sup> The shift to an investment focus is part of a broader social investment agenda between 2011 to 2017 under New Zealand's National Party-led governments.<sup>32</sup>

### *B. Oranga Tamariki and the State's Broad, Discretionary Child Protection Powers*

The Oranga Tamariki Act 1989 sets out the Ministry's care and protection powers.<sup>33</sup> The Act is New Zealand's primary care and protection statute and aims

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25. *Id.* at 8. For children born in 1990 and 1991, administrative data showed that by age 21 the children who were "known" to the care and protection system were twice as likely to have left school without at least a Level 2 NCEA qualification, seven times more likely to have been subsequently referred to Child, Youth and Family by the Police for youth offending, more than twice as likely to be in receipt of social welfare benefit and nine times more likely to receive a custodial sentence in the adult corrections system. *Id.* at 36. "NCEA," or the "National Certificate of Educational Achievement" is the main national qualification for secondary school students in New Zealand. *How NCEA Works*, NEW ZEALAND QUALIFICATIONS AUTHORITY, <https://www.nzqa.govt.nz/ncea/understanding-ncea/how-ncea-works/> [<https://perma.cc/2PUN-PGUV>].

26. INTERIM REPORT, *supra* note 18, at 7.

27. *Id.* at 20.

28. *Id.* at 15.

29. MINISTRY FOR VULNERABLE CHILDREN, ORANGA TAMARIKI, STRATEGIC INTENTIONS 2017-2022, at 19 (2017), <https://www.orangatamariki.govt.nz/assets/Uploads/Documents/Strategic-Intentions-2017-2022.pdf> [<https://perma.cc/7MCA-XH9L>].

30. FINAL REPORT, *supra* note 1, at 31, 39.

31. FINAL REPORT, *supra* note 1, at 10 and 16.

32. See Tom Baker & Simone Cooper, *New Zealand's Social Investment Experiment*, 38 CRITICAL SOC. POL'Y 428, 429 (2018). The social investment agenda has been criticized for prioritizing the easy-to-measure fiscal outcomes and its relationship to "data-driven governance." *Id.* at 434.

33. To carry out recommendations of the Expert Panel, Parliament amended the 1989 Act in two main branches of reform: the Children, Young Persons, and Their Families (Advocacy, Workforce, and Age Settings) Amendment Act 2016 and the Children, Young Persons, and Their Families (Oranga

“to promote the well-being of children, young persons and their families and family groups.”<sup>34</sup>

To understand how New Zealand’s care and protection model disproportionately impacts women who fall outside the dominant norms of “good” motherhood, it is necessary to introduce three core features of the Oranga Tamariki child protection system. First, the “paramouncy principle” guides all decision making under the Oranga Tamariki Act; second, the trigger for Oranga Tamariki intervention is a “report of concern” from any person in New Zealand; third, this trigger initiates a formal Oranga Tamariki response framework consisting of mandatory statutory duties and discretionary assessments of need.

The “paramouncy principle” guides all decision making under the Oranga Tamariki Act. The paramouncy principle requires that in all matters relating to the application of the Act the “welfare and interests of the child or young person shall be the first and paramount consideration.”<sup>35</sup> As I will outline in Part II, this principle is a critical move to privilege the child in the relationship between State and family.

The trigger for Oranga Tamariki care and protection intervention is a report of concern under Section 15 of the Act. A report of concern is a report to the agency that a child or young person has been, or is likely to be, harmed, ill-treated, abused, neglected or deprived.<sup>36</sup> The reports of concern triggering the Ministry’s powers may be made in respect of a “child or young person,” meaning “a person under the age of 14 years.”<sup>37</sup> “Any person” may make a report of concern; the notifier may be anyone from a family member, to a neighbor, to a police officer responding to an incident at the family home.<sup>38</sup>

In practice, government agencies are responsible for a significant proportion of the reports of concern: in 2017, seventy-five percent of reports of concern gave from notifiers in the category Court, education, police, health or “other government.”<sup>39</sup> A further 6.2 percent came from non-government organizations

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Tamariki) Legislation Act 2017. The changes included renaming the 1989 Act with the alternative titles “the Oranga Tamariki Act 1989” and “the Children’s and Young People’s Well-being Act of 1989.” Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017, Section 5 (N.Z.). Some changes came into force after the Legislation Act received the royal assent; others are being brought into force by Order in Council on different dates, but no later than July 1, 2019. *Id.* at Section 2.

34 Oranga Tamariki Act 1989, Section 4 (N.Z.) [hereinafter Oranga Tamariki Act], <http://www.legislation.govt.nz/act/public/1989/0024/127.0/DLM147088.html> [https://perma.cc/P79F-FAQ3.]

35. *Id.* Section 6.

36. *Id.* Section 15.

37. *Id.* Sections 2(1), 15. “Young person” has different meanings in different parts of the Act but is essentially a person over the age of 14 and under the age of 18 years.

38. Certain organizations, including school boards, District Health Boards, and the New Zealand Police, are required to adopt, report on and require a “child protection policy” on how to identify and report child abuse and neglect under Section 15 of the Oranga Tamariki Act. *See* Children’s Act 2014 (N.Z.), <http://www.legislation.govt.nz/act/public/2014/0040/latest/DLM5501618.html> [https://perma.cc/5QZT-FQD4].

39. M. DUNCANSON ET. AL., *supra* note 11, at 29.



and 8.9 percent from family.<sup>40</sup> This means that the entry point into the Oranga Tamariki system is the judgment by a person in a government agency, family or community that a child's wellbeing may be at risk and a decision to bring that judgment to the attention of Oranga Tamariki.

Once Oranga Tamariki receives a report of concern, its care and protection powers follow a mix of discretionary assessments and mandatory actions. Oranga Tamariki is required to arrange an investigation into a report of concern if it appears "necessary or desirable," but has a broad discretion to determine what is "necessary or desirable" in a given case.<sup>41</sup> Oranga Tamariki must progress the investigation if it "reasonably believes that the child or young person is in need of care or protection,"<sup>42</sup> but again has the discretion to form a reasonable belief around whether the child or young person meets the definition of being in "need of care or protection" in Section 14 of the Act.<sup>43</sup>

The broad definition of "need of care and protection" includes where a child or young person is being, or is likely to be physically, emotionally or sexually harmed, where the child's "development or physical or mental or emotional wellbeing" is being impaired or neglected in a serious and avoidable manner, and where the child's parents or guardians are unwilling or unable to care for them.<sup>44</sup> It is important to note the standards of "harm," "ill-treatment," "abuse," and "neglect" are not defined in the Act.<sup>45</sup> The concepts are applied on the assessment of the notifier making a report of concern, the Oranga Tamariki staff member determining the appropriate response to that report, and ultimately the family group conference or Court making a decision about how to proceed to protect the child.<sup>46</sup> As I will argue in Part III, these subjective assessments are vulnerable to personal bias and racist or classist preferences.

If an Oranga Tamariki officer forms a reasonable belief that a child is in need of care and protection, they must notify a care and protection coordinator, who will convene a family group conference.<sup>47</sup> The family group conference will then consider the needs of the child and make decisions, recommendations and plans for their care and protection.<sup>48</sup> Oranga Tamariki is required to consider the

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40. *Id.*

41. Oranga Tamariki Act, Section 17.

42. *Id.* at Section 17(2).

43. *Id.* at Section 14.

44. *Id.* at Section 14(1)(a), (b) and (f).

45. For the agency's general guidance to notifiers on how to identify and respond to abuse in a family, see ORANGA TAMARIKI—MINISTRY FOR CHILDREN, *Identify Abuse*, <https://www.orangatamariki.govt.nz/identify-abuse/> [https://perma.cc/EKR4-9ZB4].

46. See MARK HENAGHAN ET.AL, FAMILY LAW IN NEW ZEALAND 6.558 (17th ed. 2015) for an overview of how the New Zealand Courts interpret and apply the care and protection standard in Section 14 of the Oranga Tamariki Act.

47. Oranga Tamariki Act, at Sections 17-18.

48. *Id.* at Sections 28-29.

decisions, recommendations or plan and give effect to them by providing services and resources under the Act.<sup>49</sup>

Following the investigation and family group conference process, Oranga Tamariki may decide to turn to the Family Court to apply for a declaration that the child or young person is in need of care or protection.<sup>50</sup> The Court will only grant such a declaration if satisfied that it is not practicable or appropriate to provide care or protection to the child by other means, including by the implementation of the family group conference plan.<sup>51</sup> Where the Court makes the declaration that the child is in need of care or protection, it may then make one of the varied orders in Part 2 of the Act, including orders for services and assistance, support, and for the custody of the child.<sup>52</sup>

Oranga Tamariki is making these discretionary assessments of the critical care and protection needs of children and young people in the context of a perceived crisis of child wellbeing in New Zealand. In recent high-profile child abuse cases, the public and news media have been quick to condemn Oranga Tamariki and its predecessors for failing to act and letting children slip through the net.<sup>53</sup>

### C. *New Zealand Courts Extend Child Protection Powers to the Fetus as “Unborn Child”*

Though the Oranga Tamariki Act care and protection powers apply in respect of a “child” defined as “a person under the age of 14 years,”<sup>54</sup> from 1995 the New Zealand courts have extended these protections to the fetus. In the first key decisions to raise this issue the courts have accepted that the child protection branch of government is empowered to respond to concerns about the wellbeing of a fetus (deemed an “unborn child”) and that the court may grant protective orders over the “unborn child,” including orders formally placing the “unborn child” in the custody of the State.<sup>55</sup>

The first decision to raise the question of whether care and protection powers apply before birth is *In the matter of Baby P (an unborn child)*.<sup>56</sup> The Department of Social Welfare (a predecessor to Oranga Tamariki) brought a “novel

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49. *Id.* at Section 34. There is an exception if the Chief Executive considers the decisions, recommendations or plan to be impracticable, unreasonable or clearly inconsistent with the principles of the Act. *Id.* at Section 34(1).

50. *Id.* at Section 67.

51. *Id.* at Section 73.

52. *Id.* at Section 83.

53. See, e.g., Edward Gay, *Child, Youth and Family Blind to Moko Warning Signs*, RADIO NEW ZEALAND (Dec. 13, 2017), <https://www.radionz.co.nz/news/national/346133/child-youth-and-family-blind-to-moko-warning-signs> [https://perma.cc/H7AA-N688].

54. Oranga Tamariki Act at Section 2(1).

55. *Id.*

56. *In the matter of Baby P (an unborn child)* [1995] NZFLR 577 (FC).

application” to the Family Court for a care and protection order over the “unborn child” of a 15-year-old girl (referred to throughout the judgment as “the mother”)<sup>57</sup> who was already in the custody and guardianship of the Department.<sup>58</sup> The mother had been in a violent relationship with “H,” the father of Baby P. Judge Inglis observed that, “the relationship persisted” despite this violence, including a reported incident of H hitting the mother’s stomach when he knew she was pregnant.<sup>59</sup> Judge Inglis quoted his previous assessment of the relationship in the care and protection proceedings for the mother: “It is quite clear to any sensible person that there is no hope whatever for their relationship but of course [the mother] is too immature to understand the dangers, which to any sensible adult are totally obvious.”<sup>60</sup>

The question before the Court was whether “Baby P” was a “child” as defined in the Children, Young Persons and Their Families Act 1989.<sup>61</sup> Judge Inglis emphasized that whether the Court should exercise its care and protection powers in respect of the unborn child was a matter of discretion rather than jurisdiction.<sup>62</sup> The only New Zealand case with any bearing on the issue was *R v Henderson*,<sup>63</sup> a decision on appeal from Mr. Henderson’s criminal conviction for causing the death of an unborn child. The Court held that the fetus, which had been estimated to be at 26 weeks maturity, had been an “unborn child” for the purposes of the Crimes Act and there was no need to require the Crown to prove that the child was capable of being born alive.<sup>64</sup>

Just as the Crimes Act protected the life of the unborn child, the Children, Young Persons, and Their Families Act could be interpreted “in light of modern medical and physiological knowledge” to provide a different kind of protection for that unborn child in the child protection system.<sup>65</sup> Judge Inglis was satisfied

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57. *Id.* at 578.

58. *Id.* at 583.

59. *Id.* at 583.

60. *Id.* at 583.

61. *Id.* at 578. At the time of the judgment the definition was “boy or girl under the age of 14 years,” Section 2(1). On July 14, 2017 “boy or girl” was replaced with “a person.” Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017, *supra* note 33, at Section 7(2).

62. *Baby P*, [1995] NZFLR at 580.

63. *R v Henderson* [1990] 3 NZLR 174 (CA). In *Baby P*, Judge Inglis also outlined two English decisions, *In re D (A Minor)* [1987] AC 317 (CA) and *In re F (in utero)* [1988] 2 WLR 1288 (CA), but with the proviso that “overseas cases are of no direct help except to the extent that they indicate how similar problems have been resolved within a different statutory or common law context.” *Baby P*, [1995] NZFLR at 58.

64. *Baby P*, [1995] NZFLR at 583.

65. *Id.* Here the Judge was referring to a passage of the 1977 Report of the Royal Commission of Inquiry into Contraception, Sterilisation and Abortion (quoted in *R v Henderson*, [1990] 3 NZLR at 181, and repeated in *Baby P*, [1995] NZFLR at 582) that observed “It may now be said that it is inaccurate to speak of the child having an independent circulation only after birth, when in fact it is firmly established that a child has an independent circulation while still within the womb and that severing of the navel cord separates the child from the placenta, not the body of its mother.” NEW ZEALAND ROYAL COMMISSION ON CONTRACEPTION, STERILISATION AND ABORTION, CONTRACEPTION, STERILISATION AND ABORTION IN NEW ZEALAND: REPORT OF THE ROYAL COMMISSION OF INQUIRY 279 (1997).

that “child” could include “at least an unborn child which has achieved a state of development where it could survive independently of the mother.”<sup>66</sup>

The Judge exercised his discretion to grant the declaration and vested the interim custody of the “unborn child” in the Director-General of Social Welfare.<sup>67</sup> He suggested it would be difficult to think of “a more appropriate case” for exercising the jurisdiction, noting that Baby P “requires protection not only from his violent father but also from his mother’s immaturity and apparent infatuation with the father.”<sup>68</sup> The orders would provide Baby P with protection during birth as an extension of the agency’s existing protection of the mother.

Fundamentally, *In the matter of Baby P* sets up the unborn child question as a moment for the Court to demonstrate its commitment to the protective jurisdiction under the radical reforms of the 1989 Act. This commitment is clear in Judge Inglis’s description of the particular local context of a jurisdiction designed to provide care and protection for the powerless and his reliance on the principle of the paramountcy of the child’s welfare and interests.<sup>69</sup>

This commitment to the Court’s protective jurisdiction continued in a second decision, *Re an Unborn Child*.<sup>70</sup> Here the Department of Child, Youth and Family Services (another predecessor to Oranga Tamariki) applied to the High Court for an order under the Guardianship Act 1968 to place the unborn child under the guardianship of the Court.<sup>71</sup> Justice Heath described the facts giving rise to the application as “truly extraordinary.”<sup>72</sup> The pregnant woman “Nikki” and her producer appeared on a national television documentary to share their plans to use footage from the birth of Nikki’s child in a pornographic film.<sup>73</sup> The Department’s chief social worker met with Nikki and the producer and attempted to reach an undertaking that they would not feature images of the baby in the film. After the meeting was unsuccessful, the chief social worker applied to the Court to place the “unborn child” under the guardianship of the Court.<sup>74</sup>

Justice Heath in the High Court held that the term “child” in the Guardianship Act could include an “unborn child.”<sup>75</sup> He saw two difficulties with the reasoning of Judge Inglis in *Re Baby P*. First, Justice Heath held that the issue could not be a matter of discretion rather than jurisdiction to exercise the

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66. *Baby P*, [1995] NZFLR at 583.

67. *Id.* at 584.

68. *Id.* at 584.

69. *Id.* at 581.

70. *Re an Unborn Child*, [2003] 1 NZLR 115 (HC).

71. *Id.* at 1. The Guardianship Act contains different powers to the care and protection functions under the then Children, Young Persons, and Their Families Act 1989 (now named the Oranga Tamariki Act 1989), but the Judge held the interpretation of “child” in the Guardianship Act would be equally applicable to the 1989 Act. *Id.* at 50.

72. *Id.* at 2.

73. *Id.* at 3.

74. *Id.* at 6.

75. *Id.* at 63. As noted above the Judge explicitly stated this interpretation would be equally applicable to the Children, Young Persons, and Their Families Act 1989, at 50.

Court's powers in respect of the unborn child: for there to be any power to exercise, the Court had to be satisfied that the object of jurisdiction—here, the fetus—fell within the definition of “child” in the statute providing those powers.<sup>76</sup> Second, Justice Heath was concerned that Judge Inglis had reached the view that Baby P was a “child” within the meaning of the Act primarily on his own judgment that Baby P was at a stage of development that should fall within the definition.<sup>77</sup>

Ultimately, Justice Heath arrived at the same answer as *In the matter of Baby P* “by a different route.”<sup>78</sup> The Judge had regard to New Zealand's obligations under the United Nations Convention on the Rights of the Child, in particular the preamble statement that the child “by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth*.”<sup>79</sup> The Judge further relied on elements of New Zealand law that supported the interests of the “unborn child to varying degrees,” such as the regulation of abortion and the criminal offence of “killing unborn child.”<sup>80</sup>

Having found that the Act's jurisdiction extended to an “unborn child,” the Judge considered that it would be a matter of discretion whether to exercise the jurisdiction in an individual case.<sup>81</sup> Discretion would allow the Court to focus on the “utility and need for such orders” and avoid the “otherwise impossible” task of “endeavouring to determine the precise moment in time (for legal purposes) that an unborn child is subject to the Court's jurisdiction.”<sup>82</sup> Justice Heath recorded briefly that the decision on whether to make an order would “no doubt” be impacted by the stage of pregnancy involved and the “(general) inability” of the Court to compel a mother to do something against her will in respect of her fetus.<sup>83</sup>

On the facts before the Court, Justice Heath was satisfied that there was a likely risk of emotional harm to the unborn child from sexual exploitation of its image in the planned film and that it was necessary for the Court to intervene. The Judge emphasized his concerns that Nikki was not putting her own interests before the interests of her unborn child: he opined that her desire to be a star had overridden her judgment, and that there was nothing to suggest she had given

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76. *Id.* at 54.

77. *Id.* at 55.

78. *Id.* at 56, 63.

79. *Id.* at 61 (emphasis added); Convention on the Rights of the Child, *supra* note 15 (quoting G.A. Res. 1386 (XIV), Declaration of the Rights of the Child (Nov. 20, 1959)); see also Anjori Mitra, “We're Always Going to Argue about Abortion”—*International Law's Changing Attitudes Towards Abortion*, 1 N.Z. WOMEN'S L.J. 142, 152 (2017) (discussing the debate and compromise regarding the references to the “unborn” in the Convention and the ambiguity of “appropriate legal protection”).

80. *Re an Unborn Child*, [2003] 1 NZLR at [61]; Crimes Act 1961, Section 182.

81. *Id.* at [63].

82. *Id.*

83. *Id.*

more than a “passing thought” to the possibility of adverse effects on the unborn child.<sup>84</sup> He doubted Nikki’s own statement that she was concerned about the unborn child’s safety, health, and best interests, noting that she had not explained her thought process to conclude the unborn child would not be harmed by being associated with the pornographic film.<sup>85</sup> Justice Heath placed Nikki’s “unborn child” in the guardianship of the Court and issued various injunctions prohibiting filming of the labor.<sup>86</sup>

Just as the mother in *In the matter of Baby P* could not be trusted to act like a sensible adult in her relationship with the violent father of Baby P, Nikki could not be trusted to prioritize the interests of her unborn child in deciding whether and how to feature her labor in the pornographic film. In these circumstances, the Court saw itself as obliged to step in to lift up the interests of the fetus and protect this powerless subject from harm.

The final key decision extending care and protection powers to the “unborn child” is the 2018 judgment of *L v Chief Executive of Oranga Tamariki—Ministry for Vulnerable Children*.<sup>87</sup> A family member of the pregnant woman, Ms. T, and the Oranga Tamariki social worker for Ms. T and Mr. L’s older child made reports of concern in respect of the unborn child. The reports raised Ms. T’s allegedly poor mental health and the fact that Ms. T’s five older children had been removed from her care.<sup>88</sup> On receipt of the reports of concern, Oranga Tamariki commenced an investigation under Section 17 of the Oranga Tamariki Act.<sup>89</sup>

In the High Court the applicants sought orders essentially preventing Oranga Tamariki from “harassing” or “persecuting” them or from sending social workers to their home.<sup>90</sup> Justice Muir was required to consider whether the statutory powers of Oranga Tamariki extended to an “unborn child.” The Judge concluded that the Oranga Tamariki care and protection powers and responsibilities to receive and respond to reports of concern were not restricted to “children who have been born.”<sup>91</sup>

Justice Muir favored a focus on the “utility and need” of intervention in a given case in the Court’s discretion.<sup>92</sup> The utility and need to investigate any report of concern received before birth was “inescapable.” The Judge considered that the contrary conclusion requiring Oranga Tamariki to wait until the birth of

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84. *Id.* at [82].

85. *Id.* at [79].

86. *Id.* at [109].

87. *L v Chief Executive of Oranga Tamariki—Ministry for Vulnerable Children*, [2018] NZHC.

88. *Id.* at [12].

89. *Id.* at [13].

90. *Id.* at [3].

91. *Id.* at [27].

92. *Id.* at [32], [35].

the child to take action would frustrate the paramountcy principle and the Act's overarching purpose of promoting the wellbeing of children.<sup>93</sup>

Overall, the New Zealand courts have framed the “unborn child” cases as exceptional decisions to protect the welfare of the particular “unborn child” before the Court and avoided making any general statement about when a fetus becomes a “child.” In *In the matter of Baby P*, Judge Inglis suggested that the English decision of *Re F (in utero)* was valuable in providing compelling reasons why a discretion to intervene to protect an “unborn child” should be used “cautiously, sparingly, and only in exceptional cases.”<sup>94</sup> Justice Heath in *Re an Unborn Child* similarly emphasized that the Court would not lightly override parental decisions, particularly in decisions over an unborn child where “nobody but the mother has any real control.”<sup>95</sup>

Yet the courts' reasoning does not confine permissible State intervention over the “unborn child” to care and protection action on formal orders approved by the court. In practice, the State's intervention in the “unborn child” begins with the reports of concern and investigations that precede a family group conference or formal application for court orders under the Act. The power (and duty) to receive and investigate reports of concern hinges on the courts' acceptance in these key cases that the term “child” in the Oranga Tamariki Act can include an “unborn child.”<sup>96</sup> This acceptance activates the care and protection system for all “unborn children”: once Oranga Tamariki receives any report of concern about an unborn child, it is not only permitted, but statutorily mandated, to follow the same investigation process that it would for any child or young person post-birth. The courts' emphasis on a discretionary judicial consideration of the woman's interests and stage of pregnancy has been at the expense of any clear, unambiguous guidance about when and how Oranga Tamariki should exercise these prior care and protection powers over a pregnant woman. This prior permissible phase of State intervention is the real legacy of the “unborn child” cases.

#### *D. Oranga Tamariki Investment Model Doubles Down on Interventions Before Birth*

The new Oranga Tamariki investment model for early intervention doubles down on the accepted State interest in the “unborn child” and duty to protect that

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93. *Id.* at [34].

94. *In the matter of Baby P (an unborn child)*, [1995] NZFLR 577 (FC) at 581 (citing *Re F (in utero)* [1988] 2 WLR 128 (CA)).

95. *Re an Unborn child*, [2003] 1 NZLR at [61], [73], [88].

96. Interestingly, the courts have avoided explicitly stating that “child” includes “unborn child.” The closest direct statement is in *L v Chief Executive of Oranga Tamariki—Ministry for Vulnerable Children*, [2018] NZHC at [36-37] where Justice Muir states that he does not accept “child” must be confined to those who have been born.

“unborn child” through its focus on prevention and support services that begin before birth.<sup>97</sup> Pre-birth intervention is not just permitted, but encouraged and prioritized as a central feature of the agency’s model.

Oranga Tamariki encourages early intervention services before birth to identify families at risk of poor life outcomes and address those risk factors to ensure that children thrive.<sup>98</sup> “Early” intervention can begin as early as pre-20 weeks’ gestation, although the Oranga Tamariki practice centre advises that a formal referral to family group conference or application for court orders should be delayed until after 20 weeks for the reason that there would then be “less chance of something going wrong in the pregnancy.”<sup>99</sup>

The Oranga Tamariki practice centre identifies pre-birth as a time in a woman and future child’s life that presents a “unique opportunity” to work with whānau and other professionals. The State has identified that its duties under the new model include working with whānau to provide intense support mechanisms: supporting ante-natal health and alcohol, drug and smoking abstinence efforts, engaging with fathers, and identifying wider whānau strengths and resources to support the newborn. The services aim to maximize the opportunity to mobilize support systems within the family, whānau and community, give the parents the time to demonstrate change before birth, and support parents to meet basic needs of the child at birth.<sup>100</sup>

The work also includes monitoring specific women and families with a view to assessing the expectant parent or parents’ capacity to care for a child, their willingness to address any concerns raised by Oranga Tamariki, and their ability to make any changes that Oranga Tamariki considers necessary before birth to provide a safe, healthy environment for the child.<sup>101</sup> For example, Oranga Tamariki might visit the expectant parent or parents’ home, speak with family or whānau about possible support systems, review any prior history with care and protection services, and seek information about parental substance abuse or mental health issues.

The Oranga Tamariki early intervention model presents a paradox. A good State would indeed support women in constrained circumstances to ensure that they have the best material and personal circumstances to decide whether to carry their pregnancy to term. Such support furthers the State’s interest in the health and wellbeing of both the pregnant woman and her fetus. However, as I will argue below, delivering these interventions through the child protection branch of government under the overarching imperative to prioritize the interests of the

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97. See State Sector (Ministry for Vulnerable Children, Oranga Tamariki) Order 2016 (N.Z.), *supra* note 18, at 20.

98. *Id.* at 28.

99. ORANGA TAMARIKI PRACTICE CENTRE, *supra* note 5.

100. *Id.*

101. ORANGA TAMARIKI PRACTICE CENTRE, *supra* note 5.



child perversely operates to constrain the pregnant woman rather than empower her.

## II. FRAMING FETUS AS “UNBORN CHILD” OBSCURES PREGNANT WOMEN AND DRIVES STATE INTERVENTION

Framing the fetus as an “unborn child” serves to obscure pregnant women and drive State intervention. This Part sets out how the courts adopt the term “unborn child” and move between two different senses of the fetus as a child: the fetus as a child itself (albeit unborn) and the fetus as a future child. The “unborn child” frame sets up a continuum between the unborn and born child that drives the State to extend its well-established obligation to make the welfare and interests of the child its first and paramount consideration. This framing obscures the pregnant woman and leads the State to subordinate her interests to those of the fetus.

From the first New Zealand decision to address the State’s care and protection powers before birth, the courts and the State have favored the term “unborn child” to describe the fetus. Judge Inglis began his judgment in *In the matter of Baby P (an unborn child)* by explaining that he would speak of the “baby” as an “unborn child” following Lord Denning, “who characteristically avoided any attempt at euphemism” by speaking in “simple English” of the “unborn child inside the mother’s womb.”<sup>102</sup> The “unborn child” term is carried through subsequent decisions and the Oranga Tamariki practice materials refer to “unborn babies.”<sup>103</sup> Recently, an amendment to the Oranga Tamariki Act to create specific care and protection provisions for “subsequent children” explicitly defined the new term “subsequent child” as “a child, born or unborn.”<sup>104</sup>

The courts move between two different senses of the term “unborn child.” The first sense is the fetus as a child itself, albeit unborn. This sense underlies Judge Inglis’s humanizing descriptions of “Baby P” as “a little boy in good health” and as “a young human being at a present stage of development where he could now live independently of the mother.”<sup>105</sup> The fetus is presented as an existing child in need of protection from a present risk of harm: Judge Inglis

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102. *In the matter of Baby P (an unborn child)*, [1995] NZFLR 577 (FC) at 578 (citing *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 801 at 802).

103. *Id.*; see also *L v Chief Executive of Oranga Tamariki—Ministry for Vulnerable Children*, [2018] NZHC; ORANGA TAMARIKI PRACTICE CENTRE, *supra* note 5.

104. Oranga Tamariki Act 1989, Section 2(1) definition of “subsequent child” (emphasis added). Unfortunately the regime is outside the scope of this Note, but it essentially creates a reverse onus for parents who have had older children removed from their care by the Courts with a finding that there is “no realistic prospect” that the children will be returned to their care: Section 18B. If the parent(s) have a subsequent child they bear an onus to show that they are unlikely to inflict harm on their child: Section 18A(3)–(5).

105. *Baby P*, [1995] NZFLR at 578.

questions why such “unborn children” should be any less protected by the State than other children.<sup>106</sup>

The second sense is the fetus as “future child” or “the child who will be but is not yet born.”<sup>107</sup> Justice Muir in *L v Chief Executive of Oranga Tamariki* focuses on the need for protection of this future child when he declares the inescapable need for proper investigation “in advance of the birth of the child” in order for Oranga Tamariki to be ready to protect against any harm or neglect at birth.<sup>108</sup> In essence, this “future child” framing looks at pre-birth action as necessary to promote post-birth interests.

Neither sense of the “unborn child” turns on the viability of the fetus. Judge Inglis initially relied on viability in *In the matter of Baby P (an Unborn Child)* by holding the “child” term could “at least” include an “unborn child,” such as Baby P, at a stage of development where it could survive independently of the mother.<sup>109</sup> In *Re an Unborn Child* Justice Heath doubted the utility of the focus on viability and preferred an interpretation that avoided the need to determine a precise point in time where the jurisdiction would fall on an “unborn child.”<sup>110</sup> The judge contended that “endless arguments” over the stage at which an unborn child becomes a child would serve no useful purpose and that the stage of pregnancy should instead impact what order would be appropriate in a given case.

Once the fetus is framed as an “unborn *child*,” it is a short step to accept that Oranga Tamariki—the care and protection agency responsible for the care and protection of *children* and young people—has an interest in that fetus. The “child” description effectively sets up a continuum between the unborn and the born child where it would be nearly impossible to draw a clear line between the two and thus unjust to deny one the protection that the State guarantees to the other.<sup>111</sup>

In this light, the State’s interest in the “unborn child” is a product of protection and pragmatism. Oranga Tamariki has a well-established responsibility to advance the wellbeing of children and to assist children to prevent them from suffering harm.<sup>112</sup> From this starting point, the courts are loath to withhold the Act’s critical protection from the “unborn child.” Oranga Tamariki and the courts dismiss rigid distinctions between birth and pre-birth as cumbersome barriers to the pragmatic application of available tools to achieve what is perceived as the best outcome for the fetus. Judge Inglis suggests that

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106. *Id.* at 579.

107. ROSAMUND SCOTT, RIGHTS, DUTIES AND THE BODY: LAW AND ETHICS OF THE MATERNAL-FETAL CONFLICT 23 (Hart Publishing, 2002).

108. *L v Chief Executive of Oranga Tamariki—Ministry for Vulnerable Children*, [2018] NZHC at [27] and [34].

109. *Baby P*, [1995] NZFLR at 583.

110. *Re an Unborn Child*, [2003] 1 NZLR at [63]–[64].

111. *See id.* at [66].

112. Oranga Tamariki Act, Section 4.

there is nothing to indicate that unborn children “should to any less extent be protected from harm, be entitled to have their rights upheld, or be entitled to have their welfare promoted.”<sup>113</sup> It would be “artificial and pointless” to wait until the birth of the child.<sup>114</sup>

Framing the fetus as an “unborn child” uplifts the interests of the fetus as “child” and obscures the pregnant woman in a manner that reinforces the pragmatic application of the Oranga Tamariki Act. The Oranga Tamariki Act framework provides a clear, strong direction for the courts and Oranga Tamariki to make the welfare and interests of a child the paramount consideration.<sup>115</sup> The force of the paramountcy principle contrasts with the ambiguous, ill-defined competing autonomy or privacy interests of the pregnant woman. The courts have made oblique references to the “rights of the mother”<sup>116</sup> and the “(general) inability of the court to make orders which compel a mother to do something against her will.”<sup>117</sup> But the courts have not ventured further to unpack those rights in any depth or to interrogate when and how the pregnant woman’s interests deviate from those of the fetus.

The dominating focus on the “unborn child” as a separate subject of the court’s jurisdiction overshadows the pregnant woman’s interests. The “unborn child” becomes the primary, or even the only, subject of the court’s jurisdiction, which stems from its powers to protect vulnerable children. The pregnant woman is a far less salient character in this dynamic. She is a potential source of harm to the child and therefore a potential subject of the Court’s order, but ultimately she is peripheral to the court’s responsibility towards her fetus.

### III. DISCRETIONARY “UNBORN CHILD” INTERVENTIONS DISPROPORTIONATELY IMPACT WOMEN EXPERIENCING POVERTY AND INDIGENOUS MĀORI WOMEN

The discretionary “unborn child” interventions target a marginalized subset of the population. In this Part, I theorize and establish that using the report of concern triggers to apply broad discretionary child protection powers in a society of structural inequality and dominant white middle-class norms of good motherhood disproportionately impacts women experiencing poverty and Māori women.

While Oranga Tamariki routinely claims an interest in the fetus when it responds to reports of concern before birth, it is unlikely to claim this routine interest evenly across all parts of the population. The child protection model is neither neutral nor universal, but instead targets a marginalized subset of the

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113. *Baby P*, [1995] NZFLR at 579.

114. *Id.* at 584.

115. Oranga Tamariki Act, Section 6.

116. *Baby P*, [1995] NZFLR at 584.

117. *Re an Unborn Child*, [2003] 1 NZLR at [64].

population. The targeted subset is determined first by which children are subject to the reports of concern that activate the State's powers and later by the State's assessment of whether the child is in "need of care or protection" in the sense of being (or being likely to be) "harmed," "ill-treated," "abused," or "seriously deprived."<sup>118</sup> These are not objective standards. They reflect the norms of the decision makers and are vulnerable to classist and racist preferences.<sup>119</sup>

Oranga Tamariki applies the discretionary child protection model before birth in a society of structural inequality and dominant white middle class norms of good motherhood. "Good" motherhood norms center on the individual woman as a primary caregiver, separated from the collective resources and support of her broader family group or whānau. They include the expectation that a woman be a chaste, responsible, protective carer who puts her child first.<sup>120</sup> Such norms are peppered throughout the "unborn child cases." In *In the matter of Baby P*, we see Judge Inglis's rigid expectations for the young pregnant woman to keep herself and her fetus safe from her abusive partner.<sup>121</sup> In *Re an Unborn Child*, we hear Justice Heath's concern that the pregnant woman, Nikki, might be failing to selflessly prioritize her fetus's interests over her desire for fame.<sup>122</sup>

Oranga Tamariki is more likely to oversee the pregnancies of women experiencing poverty. The 2015 review of child protection services in New Zealand recorded that most families of children referred to the agency had "high levels of long-term need and disadvantage," including long-term unemployment and low income.<sup>123</sup> In the cohort of children born in New Zealand between 2005 and 2007, 46 percent had parents living in a high deprivation area at the time of their birth.<sup>124</sup>

The relationship between poverty and involvement with Oranga Tamariki can in part be explained by the fact that families experiencing poverty are likely to have greater contact with other government agencies. In the 2015 review, 39 percent of the children known to Child, Youth and Family by age five had a mother who had been receiving a benefit for more than four of the five years

118. Oranga Tamariki Act, Sections 17(2), 14(1)(a).

119. Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 114, 158 (2011); see also Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 788 (2001).

120. Simran Dhunna, Beverley Lawton & Fiona Cram, *An Affront to Her Mana: Young Māori Mothers Experiences of Intimate Partner Violence*, J. INTERPERSONAL VIOLENCE 1, 7 (2018).

121. See FAMILY VIOLENCE DEATH REVIEW COMMITTEE, FIFTH REPORT JANUARY 2014 TO DECEMBER 2015F 57 (2016) for a critique of how family violence policies hold mothers responsible for "failing to protect" their children from intimate partner violence in which they are a victim.

122. *Re an Unborn Child*, [2003] 1 NZLR.

123. INTERIM REPORT, *supra* note 18, at 32.

124. *Id.* at 32–33. The report does not define "high deprivation," but since 1991 New Zealand has run a New Zealand index of deprivation following each census, which reflects eight dimensions of material and social deprivation: communication (access to the Internet at home), income, employment, qualifications, home ownership, support, living space and transport). See M. DUNCANSON ET AL., CHILD POVERTY MONITOR TECHNICAL REPORT (N.Z. Child & Youth Epidemiology Serv. ed., 2018), <http://www.nzchildren.co.nz/> [<https://perma.cc/25M5-RVVS>].

prior to their birth.<sup>125</sup> Almost 60 percent had a primary caregiver on a benefit at the time of birth. As noted in Part I, contact with government agencies creates an opportunity for the agency to enter and supervise family life and may culminate in reports of concern.

The relationship between poverty and Oranga Tamariki oversight can also reflect a judgment that poor women are not good mothers. This judgment may come from the notifier making a report of concern to trigger Oranga Tamariki intervention, the Oranga Tamariki staff member deciding that a care and protection investigation is necessary, or the Court making orders in respect of the child. In the United States, Professor Dorothy Roberts, acclaimed scholar in race, gender, and the law, has identified how the contemporary child welfare system confuses poverty with neglect and maintains a fundamental division between poor and other families.<sup>126</sup> Professor Khiara Bridges has further emphasized how in public obstetrics care poverty “is presumed to indicate the absence of a moral vigilance that might manifest in harm to [a pregnant woman’s] child.”<sup>127</sup> Bridges shines a light on how poverty “is thought to index a moral permissiveness, the magnitude of which the state has the duty to determine and upon which the health and safety of the woman’s unborn child hinges.”<sup>128</sup>

Arguably, poverty is one indicator of vulnerability and need for the services that Oranga Tamariki can provide to support families. Yet the problem with this justification for targeted intervention is that Oranga Tamariki assessments and statutory services are indeed premised on a series of judgments about parenting and whether the child or young person is in need of care or protection. A need for care and protection is not just a need for services: it hinges on the formation of a belief that the child in question is in need of care or protection, in the sense that they are likely to be harmed, ill-treated, abused, or seriously deprived—or that their parents or guardians are unwilling or unable to care for them.<sup>129</sup> As I suggest above, these judgments are not objective and may reflect classist preferences for childrearing.

Oranga Tamariki interventions in pregnancy are likely to have a significant impact on Māori women. Māori children and young people are significantly over-represented in the care and protection system—at the time of the 2015 review of child protection services, the majority of children known to the agency identified as Māori.<sup>130</sup> In general, Māori children are more likely to come into contact with care and protection services, to be referred to care and protection

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125. INTERIM REPORT, *supra* note 18, at 33.

126. DOROTHY E. ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 27 (2002).

127. Bridges, *supra* note 119 at 168.

128. *Id.* at 167.

129. Oranga Tamariki Act, Section 14(a). This is not exhaustive: a child is deemed to be in need of care or protection if they fall within any of the descriptions in Section 14(a) to (i).

130. FINAL REPORT, *supra* note 1, at 21.

services for perceived risk of harm, and to stay in the care and protection system. Māori children make up 56 percent of the children in contact with child protection services by age five, yet only thirty percent of all children born in New Zealand.<sup>131</sup> For a subset of reports of concern made regarding “unborn children” and children within five days of birth, Māori children made up 47 percent of reports of concern in 2018, 51 percent in 2017, and 55 percent in 2016.<sup>132</sup>

The reasons for overrepresentation of Māori in child protection data are complex. A 2015 New Zealand study *Understanding Overrepresentation of Indigenous Children in Child Welfare Data* summarized how Indigenous people explain that overrepresentation is a result of a combination of factors extending beyond socio-economic disadvantage:

assimilationist policies of colonial governments leading to the fragmentation of families, inequitable distribution of the goods and resources of society (e.g., employment, housing, and wealth), systemic racism of a child welfare protection system imposing white middle-class notions of family and child-rearing upon indigenous families . . . , and racial bias in reporting of maltreatment and in child welfare agency decision making.<sup>133</sup>

The 1988 *Puao-Te-Ata-Tu* report captures the historical perspective on child protection services in New Zealand.<sup>134</sup> In New Zealand’s colonial history, inappropriate Pākehā structures and Pākehā determination of Māori issues “worked to break down traditional Maori society by weakening its base—the whanau, the hapu, the iwi.”<sup>135</sup> These forces made it almost impossible for Māori to maintain tribal responsibility for their own people.<sup>136</sup> Ani Mikaere, a prominent scholar on Māori self-determination and the status of Māori women, makes clear that the “disruption of Maori social organisation was no mere by-

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131. *Id.* at 34.

132. Letter from Steve Groom, General Manager Public, Ministerial and Executive Services Oranga Tamariki—Ministry for Children to author (Dec. 17, 2018) (on file with author). This data was provided in response to a request under the Official Information Act 1982 for the proportion of reports of concern regarding an “unborn child” where the “unborn child” was of Māori ethnicity.

133. Fiona Cram et al., *Understanding Overrepresentation of Indigenous Children in Child Welfare Data: An Application of the Drake Risk and Bias Models*, 20 CHILD MALTREATMENT 171 (2015) (citations omitted).

134. DEP’T SOCIAL WELFARE, PUAO-TE-ATA-TU (DAY BEAK): THE REPORT OF THE MINISTERIAL ADVISORY COMMITTEE ON A PERSPECTIVE FOR THE DEPARTMENT OF SOCIAL WELFARE 18 (1988), <https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/archive/1988-puaoteatatu.pdf> [<https://perma.cc/ZE5E-FN49>].

135. *Id.*

136. *Id.*

product of colonization, but an integral part of the process” by which the Crown aimed to destroy the principle of collectivism that ran through Māori society.<sup>137</sup>

The particular impact of colonization on Māori women must be examined at the “intersection of being Māori and female and all of the diverse and complex things being located in this intersecting space can mean.”<sup>138</sup> Scholars of *mana wāhine*, a type of Māori feminism, have emphasized the unique narratives and experiences of Māori women in the ongoing history of colonization.<sup>139</sup> Mikaere illustrates how the traditional Māori worldview emphasized the essential role of women and the supremacy of their spiritual power in controlling tribal rituals.<sup>140</sup> Mikaere explains that this pattern “of acknowledging the worth of women was reflected in *whānau* life,” where “*whānau* dynamics operated to ensure that women were well-treated by their husbands and in-laws. . . and the presence of many to assume responsibility for child rearing enabled women to perform a wide range of roles, including leadership roles.”<sup>141</sup>

Under colonization, the Crown and settlers minimized the spiritual and traditional roles of Māori women and recast the role in negative terms.<sup>142</sup> This represented a devaluation of women, which was reinforced by the introduction of an English concept of “family” that limited women to narrow domestic roles as the individual “mother of children.”<sup>143</sup> Urbanization and land confiscation policies further dislocated women from their extended *whānau* support networks. Naomi Simmonds notes that when “the *whānau* unit became progressively smaller, the responsibilities of individual women grew.”<sup>144</sup>

Social and economic disadvantage for Māori is one key driver of vulnerability for *whānau*.<sup>145</sup> In June 2018, the unemployment rate for Māori was 9.4 percent, compared to 3.6 percent for New Zealand Europeans.<sup>146</sup> Low income rates for Māori are consistently higher than the European group: in the period 2015 to 2016, 28 percent of Māori children lived in low income households as compared to fourteen percent of European children.<sup>147</sup> A higher proportion of Māori children are in sole-parent beneficiary families and households: 47 percent of sole parent beneficiary recipients are Māori.<sup>148</sup> These high levels of

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137. Annie Mikaere, *Collective Rights and Gender Issues: A Maori Women's Perspective*, in COLLECTIVE HUMAN RIGHTS OF PACIFIC PEOPLES 79, 93 (Nin Tomas ed., 1998) [hereinafter Mikaere Collective Rights].

138. Naomi Simmonds, *Mana Wahine: Decolonising Politics*, 25 WOMEN'S STUD. J. 11, 11 (2011).

139. *Id.* at 16.

140. Ani Mikaere, *Cultural Invasion Continued: The Ongoing Colonisation of Tikanga Māori*, 18 Y.B. N.Z. JURIS. 134, 139 (2005) [hereinafter Mikaere Cultural Invasion Continued].

141. *Id.* at 141.

142. *Id.* at 149; see Mikaere Collective Rights, *supra* note 137, at 92.

143. Mikaere Cultural Invasion Continued, *supra* note 140, at 149–50.

144. Simmonds, *supra* note 138, at 16.

145. CRAM, *supra* note 4, at 7.

146. DUNCANSON ET AL., *supra* note 8.

147. *Id.*

148. *Id.*

disadvantage are “symptomatic of the unequal distribution of goods and services within [New Zealand] society,” where Māori have inequitable access to and outcomes from universal services such as healthcare and education.<sup>149</sup>

Further drivers of Māori whānau vulnerability are prejudice and discrimination within New Zealand society.<sup>150</sup> The increase in Māori overrepresentation at successive decision points in the child protection system suggests an ongoing role of bias against Māori in child protection agency decision making.<sup>151</sup> Half of referrals to the agency pertain to Māori children and young people; but Māori comprise six out of every ten children and young people in State care.<sup>152</sup> The 2016 report of the Modernising Child, Youth and Family Expert Advisory Panel explicitly acknowledged that “conscious and unconscious bias in the system” was a possible cause of this overrepresentation.<sup>153</sup>

The extension of care and protection powers in the “unborn child” cases is particularly significant for pregnant women who are most likely to be targeted by State oversight and least likely to be privileged by dominant norms of good motherhood. In New Zealand’s context of structural inequality and colonization, this impact is likely to fall heavily on women experiencing poverty and Māori women. This uneven impact must be front of mind when considering how State pregnancy interventions serve to constrain rather than empower pregnant women.

#### IV. STATE PREGNANCY INTERVENTIONS PERVERSELY CONSTRAIN, RATHER THAN EMPOWER, PREGNANT WOMEN

Perversely, New Zealand’s State pregnancy interventions constrain rather than empower pregnant women. This Part draws out the individual and collective constraints on pregnant women’s rights, interests and autonomy that are obscured and ambiguous under the courts’ “unborn child” framework discussed in Part II.

At the individual level, State oversight of pregnancy may infringe upon a woman’s right to privacy in that it unduly restricts her ability to make decisions about her own life. The right to privacy provides a clear framework for evaluating what limits on a pregnant woman’s autonomy are justified and what limits exceed the proper powers of the State. Privacy includes “the ability to make important decisions about one’s own life” and embodies the concept of

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149. CRAM, *supra* note 4, at 21.

150. *Id.* at 7, 21.

151. Emily Keddell & Gabrielle Davie, *Inequalities and Child Protection System Contact in Aotearoa New Zealand: Developing a Conceptual Framework and Research Agenda*, 7 SOCIAL SCI. 89, 97 (2018).

152. *Id.*

153. FINAL REPORT, *supra* note 1, at 7.



autonomy.<sup>154</sup> Autonomy incorporates the concepts of self-determination—“a person’s interest and right . . . in reflectively making significant personal choices”—and bodily integrity, the ability “to decide what happens in and to one’s body.”<sup>155</sup>

Privacy is a promising developing tool to protect women’s reproductive choices in New Zealand. At the international level, New Zealand has adopted a right to privacy through the International Covenant on Civil and Political Rights (ICCPR), which protects against arbitrary or unlawful interference with a person’s privacy, family and home.<sup>156</sup> At the domestic level there is no statutory privacy right: the New Zealand Bill of Rights Act 1990 does not create a right to privacy, and the Privacy Act 1993 provides protections for informational privacy but does not create a standalone right. The editors of *Privacy Law in New Zealand* suggest that the omission under the Bill of Rights Act may be attributed to the uncertainty and ambiguity of the privacy concept and the difficulty of defining the right.<sup>157</sup>

Despite the absence of a standalone right, a fundamental right to privacy may be developed through New Zealand’s common law, in light of its international commitments under the ICCPR and through the comparative precedents for privacy rights in the United States and Canada.<sup>158</sup> The Bill of Rights is not a comprehensive statement of all the rights and freedoms in New Zealand<sup>159</sup> and the New Zealand courts have acknowledged the need to develop the common law consistently with the guidance of international treaties to which New Zealand is a party, even where the international obligations are not expressly incorporated in statute.<sup>160</sup> Notably, the 2018 Law Commission briefing on alternative approaches to abortion law recorded the New Zealand Privacy Commissioner’s submission that abortion engages a fundamental privacy right inherent in bodily autonomy and self-determination.<sup>161</sup>

Dorothy Roberts highlights the value of a privacy right in her groundbreaking 1991 article “Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy.”<sup>162</sup> Roberts draws out two

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154. See NEW ZEALAND LAW COMMISSION, ALTERNATIVE APPROACHES TO ABORTION LAW: MINISTERIAL BRIEFING PAPER 53 (2018), <https://lawcom.govt.nz/sites/default/files/projectAvailableFormats/Law%20Commission%20-%20ALR%20Ministerial%20Briefing%20Paper%20-%20FINAL.pdf> [<https://perma.cc/96AH-ZZJN>].

155. SCOTT, *supra* note 107, at 13-14.

156. International Covenant on Civil and Political Rights, art. 17, Dec. 16, 1966, 999 U.N.T.S. 171.

157. Stephen Penk, *Thinking About Privacy*, in *Privacy Law*, in NEW ZEALAND 20 (Stephen Penk & Rosemary Tobin eds., 2d ed. 2016).

158. See, e.g., *R v Morgentaler* [1988] 1 S.C.R. 30; *Roe v. Wade*, 410 U.S. 113 (1973).

159. Penk, *supra* note 157, at 20.

160. *Hosking v Runting* [2004] NZCA 34, [2005] 1 NZLR 1 at [6].

161. NEW ZEALAND LAW COMMISSION, *supra* note 154, at [3.4]; PRIVACY COMMISSIONER’S SUBMISSION TO THE LAW COMMISSION ON ABORTION LAW REFORM, <https://www.privacy.org.nz/assets/Uploads/Abortion-Law-Reform-submission-to-Law-Commission.pdf> [<https://perma.cc/662X-JXHE>].

162. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

critical benefits of a privacy concept for advancing the reproductive rights of women of color: the right emphasizes the value of “personhood” and protects against the abuse of government power.<sup>163</sup> Personhood is particularly significant because it affirms the role of Black women’s will and challenges the historical devaluation of Black motherhood in the history of the United States.<sup>164</sup> Privacy delineates the limits of government power in a way that is particularly valuable for women of color who, in countries where persons of color are in minority or marginalized groups, are most vulnerable to government control of their private decision making.<sup>165</sup>

Extending care and protection powers to “unborn children” compromises the privacy right of pregnant women. Oranga Tamariki claims to address children but its oversight regulates pregnant *women’s* choices about how they run their lives and what they do with their bodies. The regulation may span what they ingest, who they partner or live with, where they live and when or how they travel.<sup>166</sup> A nebulous concern about interfering with pregnant women’s choices in this way is acknowledged in the New Zealand “unborn child” cases but never articulated as a real, salient competing right to privacy.<sup>167</sup>

The right to privacy is not absolute.<sup>168</sup> The protection within the ICCPR prohibits only “arbitrary” or “unlawful interference” and privacy claims are balanced against competing public interests. One may argue that some State engagement with pregnant women’s choices is justified because the limit on decision making is minimal (for example, the idea of discouraging pregnant women from smoking or consuming alcohol) and outweighed by the State’s interest in promoting the health of the population.

Yet Oranga Tamariki oversight goes beyond minimal health interventions in two ways. First, Oranga Tamariki oversight of pregnant women’s choices comes with the understanding that if the State determines these choices are putting an “unborn child” at risk of harm, the State may activate its care and protection powers to either reach a family group conference plan for the “unborn child” or apply to the court for formal orders. The most intrusive formal order would place

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163. *Id.* at 1468.

164. *Id.* at 1469.

165. *Id.* at 1469-70.

166. Memorandum from Mindy Jane Roseman on the State of the Field: Fetal Personhood and Women’s Rights 11 (on file with author).

167. For example, Justice Heath in *Re an Unborn Child* emphasizes that the “invasive step” of interfering with the pregnant woman’s decisions as a mother should only be taken for very good reasons. *Re an Unborn Child*, [2003] NZLR at [27]-[28]. See also Justice Heath’s discussion of the academic criticism of *In the matter of Baby P (an unborn child)*, [1995] NZFLR 577 (FC): “The decision was criticised on the basis that it ran the risk of creating a conflict with the mother’s own interests; in particular, the decision created the potential for the Court making orders which controlled the mother’s behaviour during pregnancy, albeit, ostensibly, for the purposes of promoting the welfare of the unborn child.” *Unborn Children: ‘Persons’ and Maternal Conduct*, 5 MED L. REV. 143 (1997).

168. Penk, *supra* note 157, at 19.

the “unborn child” in the custody of Oranga Tamariki and allow Oranga Tamariki to remove the child at birth.<sup>169</sup>

Second, Oranga Tamariki is a State agency centered on the care and protection of children. Activating the care and protection function of Oranga Tamariki before birth fundamentally pits the rights of the pregnant woman against her fetus. It separates the interests of the fetus (the “unborn child”) and prioritizes those interests as the paramount consideration for the agency and the court. As outlined above, the interests of the pregnant woman and her fetus will often overlap and may be the same. But the controlling interest is that of the fetus: when there is a tension between the interests of the two subjects the pregnant woman’s interest will be secondary to the imperative of preventing harm to the fetus, and when there is no tension the recognition of the pregnant woman’s interest is contingent on that aligned interest of her fetus. The pregnant woman is instrumental to the best interests of her fetus. This process obscures the pregnant woman, even as it fails to fully support her ability to determine the conditions of her parenthood.

The interference with pregnant women’s privacy—both their autonomy in decision making and their bodily integrity—is a harm in itself. Interference may also create a risk of physical and mental harm to the pregnant woman and to the fetus. The threat of State punitive approaches to pregnancy, including the threat of seeking custody orders to remove the child from its parent at birth, can deter women from seeking State assistance or voluntarily engaging with social services during pregnancy.<sup>170</sup> For example, the judgment in *Re an Unborn Child* records that the pregnant woman, Nikki, was unable to give evidence as she had been admitted to hospital and it was “likely that the stress of [the] proceeding has caused her current health problems.”<sup>171</sup> In *L v Chief Executive of Oranga Tamariki—Ministry for Children*, Justice Muir commented that the applicant parents did not appear in the hearing because they were “in hiding” from the State.<sup>172</sup>

At the collective level, Oranga Tamariki oversight can impose a standard for family life that excludes women who fall outside dominant norms of good motherhood.<sup>173</sup> If the Oranga Tamariki interest in “unborn children” disproportionately targets women experiencing poverty and some Māori women, that interest in practice goes beyond an individual interference with lifestyle decisions in privacy and becomes a judgment about who is entitled to become a

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169. Oranga Tamariki Act at Section 78.

170. Lynn M. Paltrow, *Punishing Women for Their Behavior During Pregnancy: An Approach That Undermines the Health of Women and Children* 6 (Center for Reproductive Rights, 2000), [https://www.reproductiverights.org/sites/default/files/documents/pub\\_bp\\_punishingwomen.pdf](https://www.reproductiverights.org/sites/default/files/documents/pub_bp_punishingwomen.pdf) [<https://perma.cc/B3TY-YBFK>].

171. *Re an Unborn Child*, [2003] NZLR at [73]–[74].

172. *L v Chief Executive of Oranga Tamariki—Ministry for Children*, [2018] NZHC 1420 at 9.

173. See, e.g., Roberts, *supra* note 162, at 1463.

mother.<sup>174</sup> In this sense the policies perpetuate the subordination of women in New Zealand. The policies simultaneously claim to value life through prioritizing interventions for the “unborn” life to meet “high aspirations” for the long-term improvement in health, education and other social outcomes<sup>175</sup> while devaluing existing life and motherhood in the pregnant woman.

Further, Oranga Tamariki oversight of individual pregnant women distracts the public from the broader State supports that are required to improve child wellbeing. The policies alleviate the burden on the State to address broader deprivation and discourages society from inquiring into other non-intrusive, non-punitive solutions to the problem of child wellbeing.<sup>176</sup>

It is perverse that the State interventions in pregnancy serve to constrain rather than empower pregnant women. The State is not only failing to address the complex history of structural inequality and colonial oppression that renders certain pregnant women vulnerable to Oranga Tamariki oversight, it is imposing interventions that further constrain the very women it has an obligation to empower. Fundamentally, the State does not trust women to be partners in its interventions to protect the fetus or “unborn child” from harm and help it to thrive at birth. While the State purports to work with a pregnant woman to support her health and prepare for birth,<sup>177</sup> its efforts are hedged by a distrust of women’s choices and an eagerness to step in to replace the woman’s judgment with that of Oranga Tamariki and the Court.<sup>178</sup>

#### V. RECONSTRUCTING STATE PREGNANCY INTERVENTION TO EMPOWER PREGNANT WOMEN

New Zealand must reconstruct State pregnancy intervention to empower all pregnant women. I acknowledge that any reconstruction of pregnancy intervention within the State child protection branch will face the problem of how to overcome the structural limits of the paramountcy principle and the rescue model. Notwithstanding these challenges, the State’s vexed relationship with pregnant women cannot be resolved by the State withdrawing from pregnancy altogether. The State must instead rise to the challenge of reconstructing pregnancy interventions that promote women’s wellbeing and autonomous decision making.

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174. *Id.* at 1459–60.

175. FINAL REPORT, *supra* note 1, at 11; *Who We Are*, ORANGA TAMARIKI, <https://www.oranga-tamariki.govt.nz/about-us/overview/> [<https://perma.cc/ZU8H-MYVT>].

176. Roberts, *supra* note 162, at 1436.

177. *See supra* Part I.

178. *See, e.g., In the matter of Baby P (an unborn child)* [1995] NZFLR 577 (FC) at 583–84.

*A. Problem of Overcoming Paramountcy Principle and Rescue Model*

Two core features of traditional child protection services are fundamentally incompatible with the autonomy of pregnant women: the paramountcy principle and the rescue model. These structural limits cast doubt on whether the State can achieve positive, empowering pregnancy intervention within the child protection branch of government.

The “paramountcy principle” is the principle introduced in Part I that the child’s welfare and interests must be the first and paramount consideration in all decision making under the primary statute for the care and protection of children.<sup>179</sup> When the State applies the paramountcy principle to the fetus in the frame of an “unborn child” it sets up a contest between the woman and her fetus and the woman and her future child. As I have outlined in Parts II and IV, the principle elevates the fetus to the position of “child” whose welfare and interests should be prioritized at the expense of the interests of the pregnant woman.

The second challenge arises from the “rescue model.” The “rescue model” is the idea that the State meets its responsibilities for child wellbeing by establishing standards for the care and protection of children and intervening to “rescue” children when parents fail to meet those standards.<sup>180</sup> As I have explained in Parts I and III, the State sets the standards for the care and protection of children and the discretionary application of these standards in an environment of structural inequality and colonial oppression serves to impose dominant white middle-class norms of parenting and motherhood.

The rescue model places the primary responsibility for child wellbeing on individual parents and ignores the social or economic conditions that constrain the parents’ ability to meet the standards for care.<sup>181</sup> It works on an assumption that families should be independent from the State and that good parents will be able to meet all of a child’s needs.<sup>182</sup> This underplays the complex economic and social constraints on parents’ everyday ability to care for their children and reduces the State role to moments of crisis.<sup>183</sup> Because intervention is triggered by reports for these crisis moments, intervention becomes a punitive response to individual failure. The State intervenes to punish deficient parents through intrusive oversight of their decision making and the looming threat of moving the children from the parents’ custody to the custody of the State.<sup>184</sup>

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179. See Oranga Tamariki Act at Section 6 (demonstrating the “paramountcy principle”).

180. See ROBERTS, *supra* note 126, at 74.

181. *Id.* at 89.

182. See, e.g., EMILY KEDDELL, THE CHILD YOUTH AND FAMILY REVIEW: A COMMENTARY ON PREVENTION 19 (2017), [https://thepolicyobservatory.aut.ac.nz/\\_data/assets/pdf\\_file/0006/81249/Emily-Keddell-CAN-report-June-2017.pdf](https://thepolicyobservatory.aut.ac.nz/_data/assets/pdf_file/0006/81249/Emily-Keddell-CAN-report-June-2017.pdf) [<https://perma.cc/59LE-GPYG>]; Dorothy Roberts, *The Child Welfare System’s Racial Harm*, 44 NOMOS 98, 104 (2003).

183. ROBERTS, *supra* note 126, at 89.

184. *Id.* at 90–91.

The new investment focus of Oranga Tamariki is a partial move away from rescue responses and towards early support of families. However, such innovations continue to be pasted on top of the traditional crisis response structure where reports of concern trigger discretionary Oranga Tamariki contact and interventions are guided by the child's paramount interests. While this structure endures, pregnancy intervention within the child protection branch cannot be effective to empower pregnant women.

*B. Reconstructing, Not Rejecting, State Intervention*

Yet the State's vexed relationship with pregnant women cannot be resolved by the State's withdrawal from pregnancy altogether. In the reproductive health information context, Professor Lynn Freedman has called for a questioning of the traditional modes of thinking about human rights that reject State involvement, arguing that: "Our goal is not simply to eradicate the practice or prevent state intrusion on a basic freedom by rejecting any state involvement in the issue. Women need and want high quality reproductive health services, and states are key to ensuring that they get them."<sup>185</sup>

Freedman's call to use human rights principles to think about how, not whether, the State should intervene in individual lives to best promote human dignity and welfare is equally pertinent to the examination of State intervention in pregnancy. Denying State support for pregnant women would simply impose a different kind of limit on women's ability to make decisions and take action to prepare for wanted, healthy pregnancies and stable parenting relationships.

For this reason, the objective is not to do away with State intervention in pregnancy but for the State to reconstruct it in a way that promotes women's wellbeing and autonomous decision making. The reconstruction of State intervention in pregnancy is supported by an affirmative concept of the right to privacy, the concept of reproductive autonomy, the Crown's positive obligations to Māori under Te Tiriti o Waitangi and New Zealand's international treaty obligations.

Dorothy Roberts presents an affirmative right to privacy that emphasizes a duty of the State to provide the necessary social conditions and resources to support fully autonomous decision making.<sup>186</sup> Critically, the affirmative view recognizes the connection between privacy and equality, where "the dehumanization of the individual" is tied to the broader "subordination of the group."<sup>187</sup> Roberts contends that the government's "duty to guarantee

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185. Lynn P. Freedman, *Censorship and Manipulation of Reproductive Health Information: An Issue of Human Rights and Women's Health*, in *THE RIGHT TO KNOW: HUMAN RIGHTS AND ACCESS TO REPRODUCTIVE HEALTH INFORMATION* 1, 2 (Sandra Coliver ed., 1995).

186. Roberts, *supra* note 162, at 1479.

187. *Id.* at 1480.

personhood and autonomy stems not only from the needs of the individual, but also from the needs of the entire community.”<sup>188</sup>

Erin Nelson has proposed an account of reproductive autonomy that:

favours State intervention to the extent that it involves positive involvement by the State in the lives of pregnant women who need support in order to exercise reproductive autonomy (even only to a limited extent), and whose capacity for autonomy will be increased by the provision of such support and assistance.<sup>189</sup>

This focus on enhancing autonomy is most pertinent for the pregnant woman, who is carrying the fetus and thus will be the most directly affected of any State intervention. It also extends to the other parent or involved family members: the autonomy constraint is both in avoiding constraining the ability of the family to make choices, and in promoting the ability to make choices.

The objective of building positive State intervention is further supported by the New Zealand Crown’s positive obligations to Māori under Te Tiriti o Waitangi. The Oranga Tamariki Act, and any statute dealing with the control of children, is colored by the key Treaty principles of partnership, protection and participation.<sup>190</sup> In the context of child protection services, the Treaty preserves and protects the familial organization of Māori.<sup>191</sup> By July 1, 2019, Oranga Tamariki will carry new statutory duties to recognize and provide a practical commitment to the Treaty principles.<sup>192</sup> The duties include ensuring that the policies, practices and services of Oranga Tamariki “have regard to mana tamaiti (tamariki) and the whakapapa of Māori children and young persons and the whanaungatanga responsibilities of their whanau, hapū, and iwi.”<sup>193</sup> In the context of health services, the Treaty principles further require the State to work together with Māori communities to improve strategies for Māori health, involve

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188. *Id.*

189. ERIN NELSON, LAW, POLICY AND REPRODUCTIVE AUTONOMY 204 (2013).

190. *Barton Prescott v. Director-General of Social Welfare* [1997] 3 NZLR 179 (HC); *New Zealand Māori Council v. Attorney-General* [1996] 3 NZLR 140 (CA). This Note does not address the ongoing critique of the Treaty principles. *See, e.g.*, ANI MIKAERE, COLONISING MYTHS MĀORI REALITIES HE RUKURUKU WHAKAARO 139 (2011).

191. *Barton Prescott v. Director-General of Social Welfare* [1997] 3 NZLR 179 (HC).

192. Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017, Section 14.

193. “Mana tamaiti (tamariki)” is defined in the Act as “the intrinsic value and inherent dignity derived from a child’s or young person’s whakapapa (genealogy) and their belonging to a whānau, hapū, iwi, or family group, in accordance with tikanga Māori or its equivalent in the culture of the child or young person.” *Id.* at Section 1(7). “Whakapapa” is defined as “the multi-generational kinship relationships that help to describe who the person is in terms of their mātua (parents), and tūpuna (ancestors), from whom they descend” and “whanaungatanga” as “the purposeful carrying out of responsibilities based on obligations to whakapapa,” “the kinship that provides the foundations for reciprocal obligations and responsibilities to be met” and “the wider kinship ties that need to be protected and maintained to ensure the maintenance and protection of their sense of belonging, identity, and connection.” *Id.*

Māori in all levels of decision making and delivery of services, and ensure that Māori have at least the same level of health as non-Māori.<sup>194</sup>

State support of pregnancy is consistent with New Zealand's international treaty obligations to support family life. The ICCPR describes the family as "the natural and fundamental group of unit of society," which is "entitled to protection by society and the State" under Article 23 of the Convention. Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women requires State parties to "ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary."<sup>195</sup>

While the Convention on the Rights of the Child's protections before birth must be limited and are subject to a debate around whether the definition of "child" includes "the unborn,"<sup>196</sup> the Convention clearly emphasizes the positive obligation for the State to provide the conditions for a healthy family life. In particular, Article 19(2) of the Convention directs States to provide "protective measures" against abuse and neglect, including "effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child."<sup>197</sup> Article 24(2)(d) requires States to ensure appropriate pre-natal and post-natal healthcare.<sup>198</sup> Article 27(3) places the primary responsibility for a child's living conditions on their parents but also points States to "provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing."<sup>199</sup> These positive obligations to support families do not hinge on the fetus itself being a child, but should extend to support in preparation for birth.

### *C. Steps Towards Reconstruction*

I propose two initial steps toward reconstruction of State pregnancy intervention to empower New Zealand women.

The first step is to move away from narrowly targeted crisis interventions and towards broad universal support. One piece of this shift is to address the disjunction between motherhood norms and motherhood realities that leads discretionary Oranga Tamariki interventions to target a marginalized subset of

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194. MINISTRY OF HEALTH, THE GUIDE TO HE KOROWAI ORANGA: MĀORI HEALTH STRATEGY 12 (2014), <https://www.health.govt.nz/system/files/documents/publications/guide-to-he-korowai-oranga-maori-health-strategy-jun14-v2.pdf> [<https://perma.cc/E3CS-TN33>].

195. Convention on the Elimination of All Forms of Discrimination Against Women, art. 12, Dec. 18, 1979, 1249 U.N.T.S. 13.

196. See Mitra, *supra* note 79, for a discussion of the debate and compromise regarding how to approach the "unborn" in the Convention in the context of disagreement on State approaches to abortion and the ambiguity of the preamble reference to "appropriate legal protection" before birth.

197. Convention on the Rights of the Child, *supra* note 15, art. 19(2).

198. *Id.* art. 24(2)(d).

199. *Id.* art. 27(3) makes clear this is subject to the State's "national conditions" and "means."



pregnant women. Oranga Tamariki must work to embrace understandings of parenting that effectively disrupt the place of white, middle-class norms of good motherhood as the center of care and protection standards. A further piece is to prioritize universalized support services that aim to provide the social and economic conditions necessary for parents to meet the expected standards of care and enhance the existing capacities of the whānau to engage in self-determination and autonomous decision making.<sup>200</sup> Such services would provide critical support for families to prepare for birth without the looming threat of punitive interventions to override the judgment of the pregnant women or place the fetus into the formal custody of the State.

The second step is to abandon the State's claimed interest in the fetus as an unborn child separate from the pregnant woman and replace this with an interest in the health and wellbeing of the family or whānau. The interest in the family or whānau may mean the pregnant woman alone, the pregnant woman and her wanted future child, the pregnant woman and partner, or the pregnant woman and a broader family group. Instead of shoehorning pregnancy interventions into the traditional care and protection model and thereby sacrificing the rights-bearing pregnant woman to the paramount interests of her fetus, the model would situate the woman within her chosen family and community and provide conditions for her empowerment.

#### CONCLUSION

State intervention in pregnancy must be reconstructed to maximize its promise and guard against its perils. On the promise side, a reconstructed intervention must recognize that pregnancy is indeed a unique opportunity for the State to put a family in the best possible position to prepare for a wanted, healthy pregnancy and a stable parenting relationship. On the peril side, State intervention must recognize that the fetus is not a child and that traditional child protection tools are inappropriate. This does not mean that the State does not have any duties toward a wanted child, but these duties are tied to the woman's desire to produce a healthy child and her rights to the conditions that make this desired result possible.

There are no easy solutions to the State's vexed relationship with pregnancy. Going forward, it will be necessary to examine whether positive, empowering, affirmative intervention can be achieved within the child protection branch or whether the child protection branch is inevitably a site of constraint for pregnant women. The inquiry must interrogate how the State can bring its duty to grapple

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200. L. Ruwhiu, *Indigenous Issues in Aotearoa New Zealand*, in M. CONNOLLY, M. & L. HARMS, EDS., *SOCIAL WORK: CONTEXT AND PRACTICE* 107, 118 (2009).

with the deeper structural conditions limiting children's wellbeing in New Zealand into its immediate relationship with individual families.