

## ARTICLE

## The Adoption Act 1955: The Statutory Guillotine from Tikanga and Whakapapa

JESSICA MACDONALD AND MADELEINE STORY\*

The Adoption Act 1955 is an archaic piece of legislation in need of urgent reform. There is a distressing gap between the Act and the bicultural reality of Aotearoa New Zealand. This article attempts to bridge this gap by proposing reforms to ensure that principles of tikanga Māori are recognised and respected throughout the Act. It places a particular focus on the severance of whakapapa for tamariki who journey through the adoption regime. These reforms intend to mitigate the secrecy and monocultural view of the Act, and to ensure the welfare and best interests of Māori tamariki are promoted. The article concludes with reference to the lack of political attention to the Act's reform. It searches for change—Aotearoa has a responsibility to protect its tamariki.

### I Introduction

Tēnā koutou katoa  
Ko Ngongotaha te maunga te rū nei taku ngākau  
Ko Waikato te awa e mahea nei aku māharahara  
No Rotorua ahau  
E mihi ana ki ngā tohu o nehe, o Ōtautahi e noho nei au  
Ko Ross tōku pāpā  
Ko Vikki tōku māmā  
Ko Jessica tōku ingoa

---

\* The authors are undergraduate LLB students at the University of Canterbury. This article is based on an assignment required for course credit in LAWS 309: Child and Family Law. We are both of Pākehā descent and recognise that consultation with Māori is most imperative to the reforming of the current adoption scheme. The ideas below are intended merely a starting point to this long overdue conversation. We would like to thank our lecturer Ruth Ballantyne for driving our inspiration to create this article.

Tēnā koutou katoa  
Ko Opuke te maunga te rū nei taku ngākau  
Ko Waimakariri te awa e mahea nei aku māharahara  
No Ōtautahi ahau  
E mihi ana ki ngā tohu o nehe, o Ōtautahi e noho nei au  
Ko Tim tōku pāpā  
Ko Shirin tōku māmā  
Ko Maddie tōku ingoa

Above is a pepeha—a way of introducing yourself to others in Māori. It tells people who you are by sharing your connections with the people and places that are most important to you.<sup>1</sup> In writing this article, we have come to realise the privilege of knowing this information about ourselves.

A pepeha is more than just an introduction—it is the cornerstone for whakawhanaungatanga.<sup>2</sup> The practice of sharing one’s pepeha is a vital method of introducing oneself to others by sharing significant aspects of one’s whakapapa. Whakapapa is the interconnection between generations, the environment and one’s internal balance.<sup>3</sup> This connection is the core of mātauranga Māori.<sup>4</sup>

The Adoption Act 1955 fails to recognise this vital connection to Māori. Further, being rooted in Anglocentric ideals of 1950s parenthood and a lack of substantive amendment since its enactment, the Act remains ignorant to tikanga Māori. Consequently, it operates as a statutory guillotine, depriving Māori tamariki of their whakapapa.

The effect of the severance of whakapapa on Māori tuakiri and hauora is evident. Professor Maria Haenga-Collins argues that Māori adults adopted by Pākehā families when they were younger felt disconnected from the Māori world.<sup>5</sup> As part of her study, Haenga-Collins interviewed Māori participants who, she observed, “felt great shame and felt really invisible as Māori” because they do not know where they are from or who they are related to.<sup>6</sup> It was as if they were “too white to be Māori in the Māori world, and too Māori to be white in the white world”.<sup>7</sup> Annabel Ahuriri-Driscoll, who was adopted by Pākehā parents, also stated that not knowing her own whakapapa “was ... like a physical pain”.<sup>8</sup> In an introduction to her thesis on identity formation of Māori adoptees, Erica Newman contemplated the effects that her mother’s transracial adoption had on her own

---

1 Pātaka Moore and Monique Moore and “Pepeha” (2016) 53 Junior Journal 2 at 2.

2 University of Otago “Māori ki Te Whānanga o Ōtākou – Māori at the University of Otago: Mihi – Introductions” (22 December 2020) <[www.otago.ac.nz](http://www.otago.ac.nz)>.

3 Allan Cooke “The Children, Young Persons, and Their Family Act and Māori children” (2015) 8 NZFLJ 121 at 122.

4 “Whakapapa - Knowing who you are and where you belong” (15 February 2019) NRAIT: Te Whanake - Our Blog <[www.nrait.co.nz](http://www.nrait.co.nz)>.

5 Te Aniwa Hurihanganui “How closed adoption robbed Māori children of their identity” (14 July 2019) Radio New Zealand <[www.rnz.co.nz](http://www.rnz.co.nz)>.

6 Hurihanganui, above n 5.

7 Hurihanganui, above n 5.

8 Hurihanganui, above n 5.

identity as a Māori wāhine.<sup>9</sup> Through her mother's closed adoption, she was cut off from information about her whakapapa. In turn, Newman also has no knowledge of her whakapapa. She reflected on how missing such crucial information has led her to feel as though among Māori she "do[es] not have a tūrangawaewae".<sup>10</sup>

The current adoption scheme in Aotearoa is mandated by an outdated piece of legislation—the Adoption Act. The government's failure to include or recognise te ao Māori in the Act illustrates that, at the time of its enactment, Aotearoa essentially viewed itself as a monocultural country. For example, the Act does not recognise tikanga Māori and there are no mechanisms ensuring a child's right to tikanga Māori because spiritual and cultural connection were not seen as important. This likely stems from the suppression of te ao Māori upon colonisation. Consequently, the Act disregards the Crown's obligation to Māori as tangata whenua and as partners under te Tiriti o Waitangi.<sup>11</sup> Article 2 of te Tiriti provides for tino rangatiratanga—the authority of Māori tribes over their land and taonga. Tamariki are considered taonga;<sup>12</sup> therefore, the inability of Māori to dictate how they are raised under the Act is a breach of te Tiriti. Further, the overlying principle of partnership, as explained by the Waitangi Tribunal, requires the principle of mutual benefit and equal status of the partners.<sup>13</sup> As will become evident in our article, the Act does not provide benefits to Māori tamariki, nor have the voices of Māori people criticising the Act been heeded.

Since the enactment of the Adoption Act in 1955, Aotearoa has made significant headway in realising its bicultural heritage. This is illustrated by reform across key areas of law, which reflect some recognition and understanding of tikanga and te Tiriti by the Legislature. For example, the Treaty of Waitangi Act 1975 established the Waitangi Tribunal: an independent commission fit to investigate Māori claims against the Crown for breaches of promises made under te Tiriti. Another example is the recent enactment of the Family Violence Act 2018, which identifies that the response to Māori family violence must reflect tikanga practice.<sup>14</sup> Therefore, this article proposes reforms ensuring principles of tikanga Māori are recognised and respected in future adoption legislation. This article searches for change—the adoption law in Aotearoa needs to better protect the whakapapa and tikanga of its tamariki.

Part II of this article will provide insight into the history of adoption law in Aotearoa New Zealand. Part III will describe the importance of whakapapa to Māori tamariki. Part IV focuses on the key issues with the current adoption regime in respect to Māori tamariki. Part V sets out prospective reform of our adoption regime that would better protect and promote tikanga and the whakapapa of our Māori tamariki. Part VI of this article critically examines why we, as a nation, have been so slow to react to issues arising out of our current adoption regime.

---

9 Erica Newman "A Right To Be Māori?": Identity formation of Māori Adoptees" (MA Thesis, University of Otago, 2011) at 1.

10 At 1 (emphasis omitted).

11 Jacinta Ruru "Kua tutū te puehu, kia mau: Māori aspirations and family law policy" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 68.

12 Law Commission *Adoption: Options for Reform* (NZLC PP38, 1999) at [334].

13 Te Puni Kōkiri *He Tirohanga o Kawa ki te Tiriti o Waitangi* (2001) at 77.

14 Family Violence Act 2018, s 4(l).

## II An Insight Into Aotearoa's Adoption Laws

This Part will provide an insight into the history of adoption laws in Aotearoa. It includes discussions on the Adoption Act 1881, Māori customary adoption arrangements and the changes in societal views which resulted in the Adoption Act 1955.

### A *Adoption Act 1881*

Aotearoa's very first adoption legislation—the Adoption Act 1881—was enacted to respond to a growing amount of uncared and orphaned tamariki.<sup>15</sup> It granted adoptive parents the same legal rights and status as biological parents, which enabled the State to discharge its responsibility for orphaned tamariki.<sup>16</sup> The initial operation of the Adoption Act 1881 provided for open adoptions, which meant that “the adopted child would often keep the family name [of their biological parents] ... or hyphenate it with the name of their new parents”.<sup>17</sup>

Initially, Māori remained using whāngai customs without state intercession.<sup>18</sup> Whāngai is a Māori customary adoption arrangement similar to adoption or fostering wherein tamariki are not raised by their birth parents, but rather they are raised usually by a relative.<sup>19</sup> The adoptive parents are called mātua whāngai and the adopted tamaiti is called tamaiti whāngai.<sup>20</sup> The mātua whāngai and biological parents maintain an ongoing relationship with the tamaiti to ensure that he or she “[does] not lose their culture, links with their birth families or their rights of succession”.<sup>21</sup> Retaining this connection allows the tamaiti to develop a sense of identity, belonging and connection with his or her birth heritage.

### B *Adoption Act 1955*

#### (1) Changes in adoption practices

Adoption legislation was reformed because of the changes in the social climate of Aotearoa. The legal recognition of customary adoption fluctuated between the 1890s and the late 1920s<sup>22</sup> because of the overwhelming stigma against unmarried mothers and their families.<sup>23</sup> During these times, “the prevalent discourse around illegitimacy [was] one of shame, scandal and dishonour” creating a stigma not only to “the birth mother but also upon her family and her illegitimate child”.<sup>24</sup> As a result, from 1930, whāngai adoption was

---

15 Maria Haenga-Collins and Anita Gibbs “‘Walking between worlds’: the experiences of New Zealand Māori cross-cultural adoptees” (2015) 39 *Adoption & Fostering* 62 at 64.

16 At 64.

17 At 64.

18 Law Commission, above n 12, at [317].

19 Basil Keane “Whāngai – customary fostering and adoption: Page 1 The custom of whāngai” (1 June 2017) *Te Ara – The Encyclopedia of New Zealand* <<http://teara.govt.nz>>.

20 Keane, above n 19. Other terms similar to tamaiti whāngai (to feed the child) include tamaiti atawhai (show kindness to the child) and tamaiti taurima (treat with care or tend to the child). However, note that these terms have slightly different meanings for some iwi.

21 Haenga-Collins and Gibbs, above n 15, at 65.

22 Law Commission, above n 12, at [317]–[324].

23 Haenga-Collins and Gibbs, above n 15, at 64.

24 At 64.

no longer recognised as legal adoption.<sup>25</sup> This view was confirmed in s 19 of the Adoption Act 1955, where whāngai adoption provided no legal status aside from those select arrangements recognised under the Te Ture Whenua Maori Act 1993.<sup>26</sup>

The Adoption Act 1955 reflected the “‘complete (or clean) break’ theory”, which states that all tamariki are born a “blank slate, and that character development was a consequence of experience rather than the result of any inherent capacities”.<sup>27</sup> This theory refers to “the complete break ... between the ‘immoral’ birth mother and the ‘blank’ uncorrupted adopted child”.<sup>28</sup> In effect, the Adoption Act 1955 provided that, upon adoption, all contact and knowledge of the child’s biological parents was to be severed.<sup>29</sup> This is known as a “closed stranger adoption”.<sup>30</sup> Closed adoption reached its height between 1955 and 1985, with approximately 45,000 adoptions taking place during this time.<sup>31</sup> Within this figure, a large portion were cross-cultural adoptions of Māori tamariki to Pākehā families.<sup>32</sup>

Akin to land transaction, the closed adoption process effectively treated a child as property: all the legal rights over the child were conceded by the biological parents and transferred to the adopting parents.<sup>33</sup> Family arrangements that did not conform to the above narrative such as whāngai customs were excluded from recognition at law by the Adoption Act 1955.<sup>34</sup> It should be noted, however, that “acceptance of single parenting, increased access to contraceptives and abortion, and the introduction of open adoption as best practice” by the 1980s substantially reduced the number of adoptions made under the Adoption Act 1955.<sup>35</sup>

## (2) Māori tikanga within the Adoption Act 1955

Māori people’s view of parenting is strikingly different from the current adoption scheme. Māori do not view tamariki as property but as taonga—treasures that are treated with aroha and whakautē.<sup>36</sup> Whānau, hapū and iwi raise tamariki as a collective, rather than the sole responsibility of the biological parents.<sup>37</sup> As the Māori Perspective Advisory Committee observes, “Maori children know many homes, but still, one whanau.”<sup>38</sup> Consequently, the physical, social and spiritual wellbeing of a child is attributed to this wider whānau.<sup>39</sup>

---

25 Law Commission, above n 12, at [324].

26 At [309].

27 Haenga-Collins and Gibbs, above n 15, at 64.

28 At 64.

29 Adoption Act 1955, s 16(2).

30 Haenga-Collins and Gibbs, above n 15, at 63.

31 At 63.

32 Hurihanganui, above n 5.

33 Adoption Act 1955, s 16(2).

34 Law Commission, above n 12, at [324].

35 Haenga-Collins and Gibbs, above n 15, at 64.

36 Joan Metge “Ko Te Weo Māori – the Māori Challenge” (paper presented to New Zealand Law Society Family Law Conference – “The Family Court ten years on”, Auckland, September–October 1991) 21 at 24–25.

37 Cooke, above n 3, at 122.

38 Maori Perspective Advisory Committee *Puao-te-Ata-tu (day break): The Report of the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare* (Department of Social Welfare, September 1988) at 75.

39 Cooke, above n 3, at 122.

We view whāngai practice as a custom-built process specifically designed to preserve tikanga Māori. This is because the relationship between the biological parents and the child are not severed in a whāngai. Therefore, this connection strengthens whakapapa. However, it is recognised that whāngai may not be appropriate or possible for all Māori whānau.<sup>40</sup> There will be some circumstances where formal adoption may be more appropriate for a tamaiti to ensure their best interests are met. We argue that although culture is of utmost importance, this must be balanced with the best interests of the child. Nevertheless, this balancing exercise does not weaken the argument that the Adoption Act 1955 should encompass and protect tikanga principles, because ultimately, the best interests of a tamaiti can be and should be achieved whilst recognising tikanga Māori under the Act.

### III The Importance of Whakapapa

This Part will explore the concept of whakapapa and aims to inform readers of the vitality of whakapapa to te ao Māori. Thus, this Part frames the authors' reasoning for the inclusion of tikanga Māori in the amended Act.

#### *A The crucial stage of developing identity*

The development of identity begins from a young age and a stronger connection to whakapapa for Māori tamariki is crucial in developing their identity. If a tamaiti has a clear sense of identity, it is easier for her or him to make friendships and connect with others. As a result, a stronger sense of identity brings comfort and security to tamariki.

The narrative identity theory explains that humans construct identity from their coherent life story, which means we understand ourselves through constructed narratives to place ourselves in a particular time and place.<sup>41</sup> For Māori, a large contributor to their identity is the connection to their whakapapa and whenua. This is emphasised in the use of a pepeha at the beginning of a hui. Where tamariki are deprived of knowledge about their roots or excluded from lived cultural experiences, there is a clear obstruction on the development of their coherent life story. Tamariki need to understand their whole life story to fully develop a self-identity, and whakapapa is essential in this process.

#### *B Social and economic benefits and importance of whakapapa*

Knowledge of one's whakapapa has practical strength. An understanding and connection to lineage is essential for whakawhanaungatanga. In interviewing Māori adults adopted into Pākehā families, Haenga-Collins stated:<sup>42</sup>

Māori will say, where are you from? Who are you related to? What's your family name? That's how ... [Māori people] connect [with each other]. If you can't do that, a lot of the participants I met felt great shame and felt really invisible as Māori.

---

40 *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 188.

41 Helen Woodruffe-Burton and Richard Elliott "Compensatory Consumption and Narrative Identity Theory" (2005) 32 NA – Advances in Consumer Research 461 at 462.

42 Hurihanganui, above n 5.

Establishing connections with wider whānau, hapū, and iwi is only possible with a connection to whakapapa. From these connections stem opportunities—most importantly, an opportunity to belong.

Financial opportunities can stem from whakapapa.<sup>43</sup> The most obvious example of this is one's succession rights to Māori freehold land, where “[w]hakapapa is generally a necessary prerequisite” to determining entitlement.<sup>44</sup>

Another example of the importance of whakapapa is the ability to participate in the activities of post-settlement governance entities (PSGE). A PSGE is a legal entity that any claimant to a Treaty settlement process must first establish prior to settlement with the Crown.<sup>45</sup> It manages the settlement redress under the Deed of Settlement on behalf of a claimant group (generally a hapū or iwi).<sup>46</sup> The purpose of this is to satisfy the Crown that the redress will be granted to the appropriate claimant group in an adequate manner.<sup>47</sup> As such, a PSGE must be representative of the appropriate claimant kin group, be accountable to the kin group it is representing, work for the benefit of that group, and be ratified by that group.<sup>48</sup> Therefore, membership and involvement in a PSGE is based on whakapapa.<sup>49</sup> This is so that the beneficiaries of any government settlement are those whose tīpuna and whānau were impacted by breaches of te Tiriti.<sup>50</sup>

It is clear that the whakapapa of Māori tamariki holds a particular importance throughout their lives, not just in the early stages. There are several issues in the current adoption regime that fail to preserve whakapapa, which are addressed below.

#### IV Issues with the Adoption Act 1955

Published in 1988, the *Puao-Te-Ata-tu (day break)* report expressed concerns regarding New Zealand's adoption practices, in particular the overwhelming focus on Pākehā values in determining the adoption placement and ignorance of Māori values, such as knowledge of whakapapa.<sup>51</sup> The Maori Perspective Advisory Committee claimed that:<sup>52</sup>

At the heart of the issue is a profound misunderstanding or ignorance of the place of the child in Maori society and its relationship with whanau, hapu, [and] iwi structures.

---

43 *In the Adoption of AJM* [2005] NZFLR 529 (FC) at [25]–[27].

44 Nicolaas Platje “Te ao Māori, whāngai, and the law of intestacy: a principled proposal” (2021) 10 NZFLJ 107 at 109.

45 Kel Sanderson, Mathew Arcus and Fiona Stokes *Functions and Costs of Operating A Post-Settlement Governance Entity* (Business and Economic Research Limited, BERL ref #4560, December 2007) at 3 and 9.

46 At 3.

47 At 21.

48 Peter Johnston “Māori Treaty of Waitangi post settlement governance entities (PSGE's) ... 5 things you need to know!” (24 November 2015) Rainey Collins Lawyers <[www.raineycollins.co.nz](http://www.raineycollins.co.nz)>.

49 Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase – An Advisory Report for Te Puni Kōkiri, the Office of Treaty Settlements and the Chief Judge of the Māori Land Court* (NZLC SP13, 2002) at [53].

50 At [53].

51 Maori Perspective Advisory Committee, above n 38, at [74].

52 At 7.

In this article, we argue that the current adoption regime continues to ignore key tikanga principles. This article identifies three key issues within the current adoption regime that continue to frustrate the protection of tikanga.

*A Adoption law is out of step with the current scheme of family legislation*

Since the enactment of the Adoption Act in 1955, Aotearoa has come some way in embracing tikanga within family law. However, the Adoption Act is outdated and incompatible with the Care of Children Act 2004 (COCA).

At the root of this issue is the weakness of the paramountcy principle in the Adoption Act. The paramountcy principle is defined in s 4 of the COCA, which states that “[t]he welfare and best interests of a child ... must be the first and paramount consideration” in proceedings involving the care of a child.<sup>53</sup> This principle is the cornerstone consideration in all family law decisions and is prevalent in core family law legislation in New Zealand, such as in s 4A of the Oranga Tamariki Act 1989.

Section 5 of the COCA lists principles relating to the welfare and best interests of tamariki. Significantly, under ss 5(e) and 5(f), the courts should ensure, where reasonably possible, “that a child’s relationship with his or her family group, whānau, hapū, or iwi” and “identity (including, without limitation, his or her culture, language, and religious denomination and practice)” are “preserved and strengthened”. In 2000, prior to the enactment of the COCA, the Law Commission recommended in its *Adoption and Its Alternatives* report that cultural heritage, which includes social and economic heritage, is an important consideration when assessing the best interests of the child in all family proceedings, including adoption.<sup>54</sup> Incorporating cultural considerations into the guiding principles found in s 5 of the COCA has improved the preservation of the cultural heritage of tamariki.

It is worth recognising that the absence of the paramountcy principle (articulated in ss 4 and 5 of the COCA) in the Adoption Act does not necessarily mean that adoption orders are made without considering the best interests of the child. The Adoption Act does mention the paramountcy principle in part: s 11 states that, in making an adoption order, the court must be satisfied “that the welfare and interests of the child will be promoted by the adoption”.<sup>55</sup> In the case of *Director-General of Social Welfare v L*, the Court of Appeal confirmed that the paramountcy principle should apply in adoption decisions although not specified in legislation.<sup>56</sup> Therefore, it is well accepted that the welfare and interests of the child are the primary consideration in adoption decisions.

However, the role of s 11 in guaranteeing the best interests of the tamaiti lacks strength to comparable legislation that explicitly recognise the paramountcy principle. A principle similar to that of ss 4 and 5 of the COCA should be entrenched in the amended Adoption Act to ensure that the cultural rights of a tamaiti are considered in *every* adoption order.<sup>57</sup> The absence of this explicit inclusion of the paramountcy principle within the Adoption Act may have contributed to the courts historically valuing wealth over cultural or kinship ties

---

53 Care of Children Act 2004, s 4.

54 Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000) at 92.

55 Adoption Act, s 11(b).

56 *Director-General of Social Welfare v L* [1989] 2 NZLR 314 (CA).

57 Catherine Moody “Adoption Law in New Zealand: The Rights and Well-being of the Child” (2008) 1 NZLSJ 487 at 497–498.



as the primary deciding factor in the raising of an adopted child.<sup>58</sup> In other words, the limited recognition at law of Māori whānau values weakened their standing in the adoption process. This led to a large amount of cross-cultural adoption of Māori tamariki, removing them from Māori culture. This practice remains “severely frowned upon” among Māori.<sup>59</sup> However, the overwhelming effect of cultural integration and urbanisation has caused many Māori mothers to succumb to closed adoption practices.<sup>60</sup>

Explicitly recognising cultural relationships as a consideration of the welfare and best interests of the child will ensure tikanga and whakapapa are at the forefront of adoption law. It is furthermore consistent with art 20 of the United Nations’ Convention on the Rights of the Child (UNCROC), which stipulates that, “[w]hen considering [adoption placement], due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background”.<sup>61</sup>

### *B Inconsistency with the view of Māori parenting*

The Adoption Act is monocultural and does not reflect the understanding that there are “real and fundamental differences between Māori ideals and practices regarding family”.<sup>62</sup> The Act does not recognise or preserve tikanga in the extent that is required to respect the Crown’s obligations under te Tiriti o Waitangi. This was emphasised in the claims brought to the Waitangi Tribunal, which argued that the Adoption Act was in breach of the Crown’s obligations under art 2 of the Treaty.<sup>63</sup> This conferred to Māori tino rangatiratanga over their taonga.<sup>64</sup>

Speaking at an adoption conference, Professor Hirini Moko Mead reiterated a widely accepted interpretation of taonga—that is, “the child is the most important taonga to be considered”.<sup>65</sup> The dismissal of whāngai practice and whānau consultation under the Act is clearly in breach of art 2.<sup>66</sup> The adoption regime needs to work alongside tikanga to respect fundamental differences in the Māori whānau.

This issue was addressed in the case of *Barton-Prescott v Director-General of Social Welfare*.<sup>67</sup> In this case, the biological mother of the child sought to put her child up for a closed adoption.<sup>68</sup> The prospective adoptees were outside the child’s iwi, hapū and whānau. The mother’s relationship with the child’s biological father contained a history of domestic violence and presented as one factor for the child’s adoption. The child’s maternal grandmother applied for custody and additional guardianship under the Guardianship Act 1968 for the purpose of retaining the child’s customary rights and

---

58 Hurihanganui, above n 5. Professor Haenga-Collins says often courts deem Māori families too poor and therefore prefer adoption to Pākehā strangers rather than Māori kin.

59 Haenga-Collins and Gibbs, above n 15, at 64.

60 Hurihanganui, above n 5.

61 Convention on the rights of the child 1577 UNTS 3 (signed 20 November 1989, entered into force 2 September 1990), art 20(3).

62 Metge, above n 36, at 22.

63 Law Commission, above n 12, at [334].

64 Claudia Orange “Treaty of Waitangi – Interpretations of the Treaty of Waitangi” (20 June 2012) Te Ara – The Encyclopedia of New Zealand <[www.teara.govt.nz](http://www.teara.govt.nz)>.

65 Law Commission, above n 12, at [334].

66 At [334].

67 *Barton-Prescott v Director-General of Social Welfare*, above n 40.

68 At 179.

connection to her whānau, hapū and iwi. The Family Court denied this application.<sup>69</sup> The grandmother subsequently appealed to the High Court on the grounds that the Family Court failed to interpret the Guardianship Act in a manner consistent with te Tiriti o Waitangi. Furthermore, the Family Court had erred in their finding that matters concerning tikanga Māori were not the foremost factor in determining the best welfare of a Māori child.<sup>70</sup>

The High Court were of the view that te Tiriti o Waitangi is “designed to have general application”.<sup>71</sup> All legislation which deals with the status of tamariki must be interpreted as coloured by the principles of te Tiriti. The particular value placed on familial organisation by Māori must be viewed as taonga. Therefore, familial organisation is encompassed in the intended ambit of te Tiriti o Waitangi and deserves protection and preservation.<sup>72</sup> However, the Court firmly reiterated that the welfare of the child is the paramount consideration. Therefore, the child’s interests cannot be subsidiary to the wider whānau. There are circumstances where it will not be appropriate to place the child within whānau despite the tikanga value of tamariki.<sup>73</sup>

### *C Secrecy*

The Adoption Act instils an inherent secrecy into the adoption process. Despite an understanding that openness is essential to protect whakapapa, our current adoption legislation does not promote this belief. When an adoption order is made, a new certificate is issued, placing the complete legal rights of the child in the adoptive parent’s name. The first birth certificate is sealed until the age of 20, after which access is authorised under s 4(1) of the Adult Adoption Information Act 1985. While the Adult Adoption Information Act made tremendous progress in removing secrecy from the Adoption Act by removing no-access endorsements allowed under the Adoption Act,<sup>74</sup> this age restriction needs to be remedied to promote and protect the sense of identity of all tamariki.<sup>75</sup> This is in line with the Human Rights Review Tribunal’s declaration that s 4(1) and the definition of adult under s 2 of the Adult Adoption Information Act discriminates on grounds of age, thus unlawful under s 21 of the Human Rights Act 1993 (HRA) and s 19 of the New Zealand Bill of Rights Act 1990 (NZBORA).<sup>76</sup>

## **V Reform: How Can We Safeguard Whakapapa and Tikanga in the Journey Through Adoption?**

We believe appropriate reform can achieve a more bicultural approach. These changes will equip Aotearoa with an adoption regime that protects and promotes the tikanga and whakapapa of those most vulnerable—its tamariki. This Part will discuss reforms that would encourage consistency with other family legislation and with Māori parenting. It will

---

69 At 182.

70 At 184–185.

71 At 184.

72 At 184.

73 At 189.

74 Adult Adoption Information Act 1985, s 3(1).

75 Moody, above n 57, at 500.

76 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [252].

also recommend ways to mitigate secrecy within the current adoption regime in order for tamariki to gain true understanding of their whakapapa.

*A Consistency with other current family legislation: the paramountcy principle*

(1) Paramountcy principle

In order to give due emphasis to the paramountcy principle and the importance of culture in assessing the child's best interests, the Act should either replicate the principles listed under ss 4 and 5 of the COCA or refer to the COCA itself. However, we further propose that the reformed legislation must emphasise engagement with tikanga Māori. This emphasis could be incorporated into the Act by mirroring s 7AA(2)(b) of the Oranga Tamariki Act:

[T]he policies, practices, and services of the department have regard to mana tamaiti (tamariki) and the whakapapa of Māori children and young persons and the whanaungatanga responsibilities of their whānau, hapū, and iwi.

Imposing this additional obligation will make the legislation more consistent with art 30 of the UNCROC—that indigenous and minority children have the right to enjoy their own culture—as well as international jurisdictions.<sup>77</sup>

We recognise that adoption reform must reflect our most up-to-date social landscape. New Zealand is only beginning to confront the inequity within our legal system. Inclusion of the paramountcy principle will provide a mechanism for equity, as it recognises that every child's needs are unique. Recent amendments to legislation, such as the Oranga Tamariki Act, recognise that every child has differing requirements of support. Recognising this in the Adoption Act will ensure the court has a mandate to consider all the potential needs of a child during adoption and ensure that their decisions will promote the best development of all tamariki in Aotearoa.

(2) Cultural reports for cross-cultural adoption applications

Where the paramountcy principle is implemented into the Adoption Act, there is a question as to how these considerations of culture and tikanga would operate in practice. Frequently, in care of children matters, the court calls for reports listed under s 133 of the COCA. A court may request a cultural report when determining applications under the Act,<sup>78</sup> and can only do this if it is essential to the disposition of the application, is the best source of information (with regard to cost, quality, and timeliness), and that sourcing the report will not cause an delay that will unduly prolong proceedings or have a negative effect on the child.<sup>79</sup> In obtaining these reports, a court can request an author with specific qualifications, or direct the Registrar to do so.<sup>80</sup>

In 2000, the Law Commission's recommendations effectively stated the same process should occur for cross-cultural adoptions:<sup>81</sup>

---

77 For example, jurisdictions such as British Columbia, South Australia and the Northern Territory: see Law Commission, above n 54, at [207].

78 Care of Children Act, s 133(1B).

79 Section 133(3).

80 Section 133(2).

81 Law Commission, above n 54, at [224].

When considering cross-cultural adoption applications, the court should call for a report on cultural matters to ascertain the suitability of the placement and how the prospective adopters intend to foster the child's cultural heritage.

We agree with this recommendation. This could be incorporated into the Adoption Act by inserting a provision similar to s 133 of the COCA, allowing courts to acquire cultural reports for adoptions. The Law Commission also recommended that a Māori social worker provide a social worker's report in applications to adopt a Māori tamaiti, and that where practicable, the Māori social worker have iwi affiliations with the tamaiti.<sup>82</sup>

Identifying who might be fit to provide such a cultural report poses some issues—who is Māori and who is not? Newman cites herself as an example in illustrating this point:<sup>83</sup>

I am the daughter of a transracially adopted Māori woman who has not been able to obtain information about her Māori heritage. My mother is visibly Māori, I am able to pass as Pākehā. Do I have the right to say, "I am Māori"? If so, what gives me that right? My mother does not know her whakapapa (genealogy); therefore I do not know my whakapapa. We have both been brought up within Pākehā society. Neither of us have participated within Māori society. Hence I ask the question again, "Do I have a right to claim a Māori identity?"

One can be biologically connected to Māori ancestors but have little understanding of the importance of whanaungatanga. Conversely, one may have no such biological connection but have a comprehensive understanding of whanaungatanga through their immersive te ao Māori upbringing.

Therefore, there must be a safeguard in legislation to ensure social workers employed for this particular purpose have a comprehensive cultural understanding before reporting to the court in detail. Such a safeguard could be created by including a definition of who is "qualified" to provide this report in the proposed cultural reports provision of the Adoption Act. Such definition should only be made on consultation with Māori. This may include the Law Commission's recommendation in preference to a social worker with iwi affiliations.<sup>84</sup>

## B *Consistency with the Māori view of parenting*

### (1) Removal of ss 18 and 19 of the Adoption Act

Under s 19 of the Act, whāngai adoptions are not recognised by law, except for those select arrangements recognised under the Te Ture Whenua Maori Act 1993.<sup>85</sup> Section 18 provides that the processes of closed adoption outlined in the Act applies to any person, "whether a Maori or not". This article submits that the recommendations of the Law Commission should be followed by simply repealing ss 18 and 19 of the Act.<sup>86</sup>

Prima facie, repealing these sections does not align with the purpose of reform, as this action alone does not acknowledge whāngai adoptions as options for childcare.<sup>87</sup>

---

82 At [223].

83 Newman, above n 9, at 1 (footnotes and emphasis omitted).

84 Law Commission, above n 54, at [223].

85 Te Ture Whenua Maori Act, s 108(3).

86 Law Commission, above n 54, at [209].

87 At [210].

However, this article concurs with the Law Commission that statutorily recognising whāngai arrangements is not the most beneficial option for reform. First, if the customary process is recognised in statute, there must be a definition of that process. It will be difficult to establish a “pan-Māori view” of adoption processes, as it differs for every whānau, hapū and iwi.<sup>88</sup> Secondly, enshrining the custom in statute creates difficulty in allowing it to develop following Māori culture and society.<sup>89</sup> Amending legislation is a technical and lengthy process. With many different attitudes on adoption, there is potential for the principle to be distorted, and its progression restricted. There has been little attention to the Act by Parliament to date. Therefore, it does not seem appropriate to place trust in the legislature to maintain the progression of the custom. Thirdly, for whāngai arrangements to be enforceable, a sanction must be implemented to encourage compliance.<sup>90</sup> The sanction for when the arrangement is broken would eventually involve the discharge of the adoption order.<sup>91</sup> However, the upheaval of the child from their established routine and reducing contact with respondent parties clearly contradicts the purpose of whāngai arrangements, which is to uphold the best interests of the child.<sup>92</sup>

We believe Māori customary arrangements should be left to their informal nature. This has been the main attribution to its success.<sup>93</sup> If whānau would like their customary adoption to have the certainty of legal enforceability, then they can get an almost comparable legal customary adoption under related legislation.<sup>94</sup> For example, a parenting order has great flexibility to ensure the particular needs of the whānau and tamaiti whāngai are met. A parenting order provides whānau with greater control to ensure the principles of tikanga are met in their arrangements.

## (2) Whānau involvement in the consent to adoption

Under ss 7(1) and 7(2) of the Adoption Act, the court must obtain the consent of only the birthparents before a tamaiti is adopted.<sup>95</sup> This ignores Māori collective views of parenting, more specifically the significant role whānau, hapū and iwi play in the wellbeing of their tamariki.

It is of utmost importance to Māori that, in obtaining consent for the adoption the kaumātua and all the contributors to the welfare of the tamaiti play a leading role in the adoption negotiations.<sup>96</sup> Otherwise, issues may be created within whānau, as those who significantly contribute to a child’s wellbeing may be powerless in the eyes of the law to intervene in adoption applications.<sup>97</sup> If anyone is disproportionately problematic or unjustified in withholding consent, the courts have the power, under the circumstances in s 8, to dismiss the consent of that particular person.

---

88 At [210].

89 At [210].

90 Helen Colebrook and Megan Noyce “Adoption Reform” [2000] NZLJ 363 at 363.

91 At 363.

92 At 363.

93 At 363.

94 Annis Somerville “Tikanga in the Family Court — the gorilla in the room” (2016) 8 NZFLJ 157 at 162.

95 Or the spouse of the applicant, per s 7(2)(b).

96 Ruru, above n 11, at 73.

97 Somerville, above n 94, at 161.

Increased whānau involvement was not a recommendation by the Law Commission in their 2000 report, but this article submits that extending ss 7(1) and 7(2) would align with the purposes of reform outlined throughout the report and would be more consistent with s 3(2)(b) of the COCA, which acknowledges the role of other family members in the care of children.

### *C Mitigating secrecy of the adoption regime*

#### (1) Access to information

The Adult Adoption Information Act allows those 20 years of age or older access to their original birth certificate.<sup>98</sup> The age restriction was founded on the fears of adoptive parents that the birth mother would seek to have contact with the adoptive child and unsettle the relationship between the adoptive parents and their child.<sup>99</sup> At the age of 20, which was seen as the age of majority, the adoptive person's right to this information was believed to surpass the rights of the adoptive and birth parents.<sup>100</sup> However, we argue that there should be no age restriction at all on the access to an original birth certificate. Given that understanding of whakapapa is vital to development, access needs to be made available from a younger age, yet the current legislation denies access to information in the years that it will be most valuable to tamariki. Further, as children mature and develop their identities at different paces, we do not think it is appropriate to impose a formulaic approach.

#### (2) The reimagined birth certificate

Currently, when an adoption order is made, a new certificate is issued placing the complete legal rights of the child in the adoptive parent's name. This new birth certificate contains no information as to genetic origins or whakapapa. Given our understanding of the importance of whakapapa on the development of a child, birth certification is a practical way where genetic origin can be recognised and protected throughout the process of adoption. This article endeavours to illustrate that we can accommodate the diverse circumstances of all children by reforming birth certification.

We propose that Ruth Ballantyne's reimagined birth certificate be implemented by new legislation.<sup>101</sup> The proposed birth certificate provides a space to include the child's biological parents, alongside their adoptive legal parents. Such would distribute information across three pages. The first page would contain only the most basic information covered by the current birth certification. This page would be used for all legal and administrative purposes.<sup>102</sup> The second and third pages are independent from the first page. They would contain more extensive information as to an individual's genetic

---

98 Adult Adoption Information Act, s 4.

99 Law Commission, above n 12, at [430].

100 At [430].

101 Ruth Elizabeth Grace Ballantyne "Legal Parentage 'By Design': Reimagining Birth Certificates in Aotearoa New Zealand" (LLM Thesis, Victoria University of Wellington, 2019).

102 At 128.

origins and, where possible, adoption circumstances.<sup>103</sup> The information provided in the second and third pages would not be required for legal and administrative functions, which would practically mitigate privacy concerns.<sup>104</sup>

The proposed birth certificate provides a space to include the child's biological parents, alongside their adoptive legal parents.<sup>105</sup> There is also room to include the date and place of adoption.<sup>106</sup> This reform would practically sustain an adopted child's link to his or her whakapapa and genetic origins.<sup>107</sup> It would also instil an element of openness to the practice of adoption which is required to preserve the vital link to whakapapa. The biological heritage of a child cannot be erased by birth certification—it must be acknowledged as it forms an essential element of identity.

### (3) Iwi Database

This article submits that an “iwi database” be implemented in legislation—a recommendation proposed by Ngāi Tahu.<sup>108</sup> This database would involve iwi authorities creating and maintaining a register of adoptions of Māori children of their iwi. The database could hold information on each child that the iwi view as vital to foster a connection with whakapapa. The iwi could control who had access to this information in the database.<sup>109</sup> We believe this is a practical strategy that will ensure Māori children have access to enough information to understand and connect with whakapapa.

## VI Why Have We Been So Slow to React?

As many of the above reforms are relatively straight forward and widely supported, it is natural for one to question—why has the Adoption Act 1955 not yet been reformed?

Adoption Action is an incorporated society dedicated to proposing and promoting changes to adoption legislation, policies and practices.<sup>110</sup> Adoption Action published a timeline on the *Chronology of Moves to Reform Adoption Laws Over the Last 40 Years*.<sup>111</sup> The timeline reflects the consistent and unanimous recognition that adoption reform is necessary.<sup>112</sup> However, this historical overview shows that over the last 40 years, the burden of reform had been passed throughout successive governments and has yet to be substantively addressed. We discuss how wider factors within the political sphere are attributable to Aotearoa's slow reaction to reform the Act.

---

103 At 129.

104 At 124–125.

105 At 123.

106 At 123.

107 At 122.

108 Law Commission, above n 12, at [341].

109 At [341].

110 Adoption Action “Aims and Objectives” Adoption Action: Adoption Law Reform <<http://adoptionaction.co.nz>>.

111 Adoption Action Inc *Chronology of Moves to Reform Adoption Laws over the Last 40 Years* (March 2019).

112 At 12.

### A Lack of government priority

There has been a lack of priority from the New Zealand government to reform the Act stating that the “review of adoption law is on hold because of competing priorities for law reform in the justice system”.<sup>113</sup>

In 2016, the decision in *Adoption Action Incorporated v Attorney-General* gathered political attention due to Parliament’s obligation under the HRA to respond to inconsistencies in rights.<sup>114</sup> In this case, the applicant alleged that particular provisions of the Adoption Act and the Adult Adoption Information Act were discriminatory on six prohibited grounds of discrimination. For each alleged inconsistency, the applicant sought declarations that the particular provisions were inconsistent with the freedom from discrimination affirmed by s 19 of the NZBORA, pursuant to s 92J of the HRA.<sup>115</sup> However, then Minister of Justice Amy Adams dismissed two out of the six declared inconsistencies found,<sup>116</sup> because the Ministry of Social Development and the courts applied the Act in a rights-consistent manner.<sup>117</sup> Adams stated that “the matters identified by the Tribunal do not significantly impact on adoptions, and therefore do not represent a situation that would move the government to undertake large scale reform”.<sup>118</sup>

Adams further expressed two reasons declining reform of the Act. First, the government is currently undertaking other various legislative reforms and “[t]o undertake reform of the Adoption Act would require significant resource allocation”.<sup>119</sup> Secondly, the government prioritises “advancing its current work programme before beginning other substantial reform”.<sup>120</sup> These statements were made in 2016 reflecting the historical attitude towards reform of the Act. However, at the time of writing this article, the previous reforms prioritised in the past have now been implemented. For example, we now have the Privacy Act 2020, Trusts Act 2019 and Family Violence Act 2018, yet no priority has been given to the substantial reform of the Adoption Act.

Dismissal due to overload of work may be understandable in some circumstances. However, the Adoption Action timeline demonstrates that adoption reform has been a topic of conversation since early 1979.<sup>121</sup> This leads supporters to wonder whether the lack of reform can still be attributed to extenuating circumstances.<sup>122</sup>

---

113 At 11.

114 *Adoption Action Inc v Attorney-General*, above n 76. See generally Human Rights 1993, ss 97]–97K. See also Amy Adams *Government Response to declarations of inconsistency by the Human Rights Review Tribunal in Adoption Action Incorporated v Attorney-General* (Ministry of Justice, August 2016).

115 *Adoption Action Inc v Attorney-General*, above n 76, at 113–114.

116 Adams, above n 114, at [5].

117 At [10].

118 At [10].

119 At [8].

120 At [8].

121 *Adoption Action Inc*, above n 111, at 1.

122 See Bess Manson “Robert Ludbrook, campaigner for adoption reform” (16 November 2019) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.



### B *Controversial nature of reform*

The Adoption Act requires urgent reform for more than just the recognition of tikanga Māori principles. If any adoption principles were to be reformed, it is highly likely to be a complete overhaul of the Act rather than a reform of specific sections in isolation. In our opinion, a complete overhaul of the Act would uncover issues that have a controversial history and have slowed down the process of reform for all adoption principles.

It is also our opinion that the complacency to reform the Act may be attributed to a reluctance to instil reforms that lack political or public support. An example of a controversial nature of reform is the enactment of the Marriage (Definition of Marriage) Amendment Act 2013 (MAA), which allowed same-sex couples to legally marry in Aotearoa. This legislation came 17 years after *Quilter v Attorney-General* where the applicants argued that the Marriage Act 1955 did not prohibit same-sex marriage, and that discrimination on the basis of sexual orientation was prohibited under the NZBORA and HRA.<sup>123</sup> Helen Clark acknowledged that “[m]arriage is only for heterosexuals” and did not provide a commitment to reform the Marriage Act due to the support many New Zealand citizens maintained towards longstanding definition of marriage between a man and a woman.<sup>124</sup> This demonstrates that despite the awareness of the discriminatory nature of the Marriage Act, there was a reluctance to commit to reform due to the divide in opinion throughout Aotearoa.<sup>125</sup>

As similar reluctance to reform the Adoption Act is likely. Isla Mirren Doidge suggests that legislators will “wait for the fear” many conservatives have about the same-sex joint adoption reform “to die down” before a total overhaul of the Adoption Act begins.<sup>126</sup> Prior to the MAA, homosexual couples were not defined as “spouses” for the purposes of the Act, thus could not adopt a child together,<sup>127</sup> and many submissions to the Select Committee in relation to the MAA demonstrated the controversy regarding homosexual couples adopting in New Zealand.<sup>128</sup> Reference to the divided vote of the House of Representatives on the third reading of the Marriage (Definition of Marriage) Amendment Bill 2013 (77 for, 44 against) reveals apprehension amongst politicians towards making progressive changes.<sup>129</sup>

Mirren Doidge explains that legislators are waiting to reform the Adoption Act when there is no longer an immediate correlation between the Act’s reform and gay adoption, which was created by the media and public’s focus on equal gender rights rather than making New Zealand’s adoption laws more child-centred.<sup>130</sup> This was because the inequality of same-sex adoption rights was considered not only as a big problem, but the only problem.<sup>131</sup>

---

123 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 523–524.

124 “Marriage for heterosexuals only, PM says” *New Zealand Herald* (online ed, Auckland, 22 June 2004).

125 Isla Mirren Doidge “Law Reform and the Adoption Act 1955: A history of misfortune” (LLB (Hons) Dissertation, Victoria University of Wellington, 2016) at 19.

126 At 26.

127 At 25.

128 At 26.

129 (17 April 2013) 689 NZPD 9506.

130 Mirren Doidge, above n 125, at 26.

131 At 26.

### *C Where do we currently stand?*

As of September 2016, UNCROC recommended that New Zealand promptly review its adoption legislation to align with the convention, noting the significant delay in reform.<sup>132</sup> On the 6 April 2018, Prime Minister Jacinda Ardern stated that adoption reform was a priority for the Labour-led Government.<sup>133</sup> In late October 2019, a petition initiated by Christian Newman “to simplify and speed up the process for adoption” was submitted to Parliament with over 30,000 signatures.<sup>134</sup> In June 2021, the Ministry of Justice revealed that Aotearoa’s adoption laws are being reviewed and opened public submissions on our current adoption laws.<sup>135</sup> The Ministry of Justice website states that the cultural aspect of adoption will be an area of review. An additional round of consultation will occur in 2022 to ascertain the public’s views on the government’s proposals for reform.<sup>136</sup>

## **VII Conclusion**

Aotearoa has a responsibility to protect its tamariki, whakapapa and the principles of tikanga in the adoption regime. Everyone has the right to an identity and our adoption legislation needs to safeguard that right. It is concerning that we have been so slow to react to the recurrent issues emerging from our adoption regime. Despite the Law Commission’s recommendations in 2000, there has been little movement towards reform. This is troubling as the adoption regime directly impacts children—the most in need of protection.

He aha te mea nui o te ao? He tāngata, he tāngata, he tāngata. The most important thing in the world is our people. We call upon government to respond to the building pressure of reform to protect the taonga of Aotearoa. The focus of this article was on the protection of whakapapa and tikanga within the adoption regime. However, this issue should not be viewed in isolation. Other issues within our adoption regime need an immediate remedy. These issues emphasise the need for change.

---

132 Adoption Action Inc, above n 111, at 13.

133 At 15.

134 Christian Newman “Petition of Christian John Newman: Update the Adoption Act 1955 to simplify and speed up the process for adoption” (3 October 2019) New Zealand Parliament <[www.parliament.nz](http://www.parliament.nz)>.

135 Ministry of Justice “Review of adoption laws in Aotearoa New Zealand” (August 2021) <<https://consultations.justice.govt.nz>>.

136 Ministry of Justice “Adoption Law Reform” <[www.justice.govt.nz](http://www.justice.govt.nz)>.