

EARNING THE NAME ORANGA TAMARIKI: THE VINDICATION OF TIKANGA FOR CROSSOVER CHILDREN

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I Introduction

Changes to the Oranga Tamariki Act 1989, which came into force on 1 July 2019, create a robust legislative standing for the implementation of tikanga. This article will argue that as a natural consequence of this statutory vindication, the mana of those classed as “crossover” children will be affirmed. Such an affirmation is significant when considering the historic colonial context in which the mana of children has been routinely trampled.

Crossover children are those who have “charges before the Youth Court as well as care and protection proceedings before the Family Court”.¹ This dual status inevitably “signifies high level care and protection concerns”,² making crossover children a recognisable class of vulnerable persons. The majority of this at-risk category identify as Māori, making them the primary group affected by changes to the Oranga Tamariki Act. The Act itself was designed to provide a practical commitment to Te Tiriti o Waitangi, which is recognised as being one of the constitutional documents of New Zealand. As a result, one could expect that the statute revitalises the approach taken with regard to care and protection.

This article will explore the changes to the Oranga Tamariki Act and how they affect crossover children as a particular class of vulnerable people. Part II will define tikanga. Part III will describe the changes to the Oranga Tamariki Act 1989. Part IV will explore how the legislative changes affect crossover children as a particular class of vulnerable people in practice. Part V will question whether the changes as a whole matter when balanced against the fact that they function within a legal system which has a historic

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1 *New Zealand Police/Oranga Tamariki v LV* [2020] NZYC 117 at [11].

2 At [11].

and ingrained disregard for te ao Māori. Finally, Part VI will speculate as to whether these changes could expand to encompass Pasifika tamaiti, who also constitute a large proportion of those classed as crossover children.

II Defining Tikanga

The system of law that came to be known as tikanga Māori emerged from the luggage of Kupe’s people and was shaped by the demands of his descendants.³ “Tika” has the outer surface meaning of straight, right or direct, while the suffix “nga” works to transform it into denoting “the system by which correctness, rightness or justice is maintained”.⁴ While tikanga seems to connote what we understand as being the precepts of law, they are not coterminous ideas.⁵ Indeed, what could be considered *tikanga* might not be what one would or could term *law*. This flexibility means that, while tikanga can guide us so that we can orient ourselves rightly, there is not a singular path one could take and term as being *correct*. This reflects the multidimensional nature of human life. The brief definition of tikanga Māori in s 2(1) of the Resource Management Act 1991, then, seems to rightly leave room for navigation. It offers simply that tikanga refers to “Māori customary values and practices”.⁶

A Why Define Tikanga?

It is important to define tikanga (though multiplicitous) at the outset, as the ways in which we seek to orient ourselves *correctly* indelibly impact the way in which the provisions in the Oranga Tamariki Act are both read and applied. Furthermore, the core values reflected in the dictum of tikanga are both implicitly and explicitly presented in the Act, even where the word tikanga is absent. These core values are:⁷

- (a) Whanaungatanga, as “the source of the rights and obligations of kinship”;

3 Joseph Williams “Lex Aotearoa: A Heroic Attempt to Map the Māori dimension in Modern New Zealand Law” (2013) 21 Wai L Rev 1 at 2.

4 At 2.

5 At 2–3.

6 Resource Management Act 1991, s 2(1)

7 Williams, above n 3, at 3.

- (b) Mana, as “the source of rights and obligations of leadership”;
- (c) Kaitiakitanga, as an “obligation to care for one’s own”;
- (d) Tapu, as a “social control on behaviour”; and
- (e) Utu, as the source of rights and obligations with regard to reciprocity.

Understanding the directives central to tikanga is important because it is impossible to competently implement that which one cannot understand or recognise. The following analogy by Judge Annis Somerville, writing extrajudicially, seems apt: that tikanga is the “gorilla in the room” whose presence goes unnoticed until it is proclaimed.⁸ In proclaiming values central to tikanga, the newly revamped Oranga Tamariki Act appears to place tikanga squarely before the court. Here, the responsibility of recognition, of seeing the “gorilla” that is so obviously in the room, falls upon the interpreters and arbiters of the law.

III What are the Legislative Changes?

The changes made to the Oranga Tamariki Act with particular relevance to crossover children are as follows:⁹

- (a) The introduction of tikanga Māori concepts related to mana tamaiti, whakapapa and whanaungatanga, as well as the statutory definitions afforded to these terms;¹⁰
- (b) a duty placed on the Chief Executive of Oranga Tamariki with regards to the Treaty of Waitangi;¹¹ and
- (c) alterations to purposes, and specific and general care and protection principles.¹²

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

9 See generally Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017.

10 Oranga Tamariki Act 1989, ss 2, 4, 5 and 13.

11 Section 7AA.

12 Sections 4, 5 and 13.

A Why are New Reiterations Concerning Tikanga Māori Concepts Significant?

In requiring that a Māori child be seen within a kin matrix consisting of whānau, hapū and iwi, tikanga Māori and its precepts are placed squarely before the court — as Sommerville postulated they should be.¹³ In doing so, the court is charged with a duty to aid the differing layers of the kin matrix when participating in decisions which affect the welfare of their children. As part of bolstering participation of the differing kin layers, the court is called to support the family connections that make engaged participation possible. As a result, the sustainability of the whānau unit as a whole becomes a matter for judicial concern, in accordance with s 5(c)(ii) of the Oranga Tamariki Act. Such a focus on the sustainability of the kin matrix directly aligns with the principles of participation, partnership and protection espoused in the Treaty of Waitangi. Judge Joe Williams asserts that seeing a child as belonging to an extended family, village or tribe is revolutionary in that it recasts the stereotypical norm in which a child belongs to their parents alone.¹⁴ His Honour notes that, for a country which can often find itself caught in a “natives and settlers paradigm”, such recognition is “radical”.¹⁵ While previous versions of the Act had attempted to achieve similar radical objects, this version makes legislative intent clearer by repeatedly recognising tikanga Māori concepts, with particular and regular reference to mana tamaiti, whakapapa and whanaungatanga.

Recognition of these concepts is significant with regard to crossover children as they affirm that a culturally competent approach be taken. As such, a change in approach could bring about a change in result.

13 Somerville, above n 8, at 169.

14 Joe Williams, Judge of the High Court of New Zealand “Address to the New Zealand Family Court Judges” (Judges Triennial Conference, Christchurch, 11 October 2017) at 6 as cited in Sharyn Otene “Te Hurihanga Tuarua? Examining amendments to the Oranga Tamariki Act 1989 that took effect on 1 July 2019” (2019) 9 NZFLJ 139 at 140.

15 Williams, above n 14, at 6 as cited in Otene, above n 14, at 140.

B What is the Significance of the Duties Imposed on the Chief Executive?

The newly imported s 7AA of the Oranga Tamariki Act imposes duties upon the Chief Executive to provide a practical commitment to the Treaty of Waitangi. Broadly, these duties are:¹⁶

- (a) to reduce disparities by setting measurable outcomes for Māori children and other young persons who come to the attention of the department;
- (b) to have regard to mana tamaiti and the whakapapa of Māori children and young persons, as well as whanaungatanga responsibilities with regard to their whānau, hapū and iwi; and
- (c) to develop strategic partnerships with iwi and Māori organisations to: improve outcomes for Māori children and their whānau; exchange information; and delegate functions in culturally competent ways.

While these obligations fall squarely upon the Chief Executive, they are incredibly relevant to the court. This is because the statutory affirmation of iwi involvement with regards to proceedings increases the likelihood of iwi presence in court and encourages representations to be made under s 166(1)(g). The affirmation of iwi involvement functions to inform the entrance of whānau into care and protection proceedings, working to ensure awareness of both the options available and the consequences that arise out of those options. The involvement of whānau, iwi and other relevant bodies achieves the legislative purpose of strengthening the capability of whānau. In increasing the capability of whānau to navigate the care and protection process, the likelihood of separation from whānau decreases. Prospectively, this means that fewer children enter or remain in state care. If the Family Court was able to deal with the underlying causes for offending — which include, but are not limited to, tumultuous family situations, worsened by state intervention — the number of children before the

16 Oranga Tamariki Act, s 7AA(1)(2).

Youth Court should surely decrease. Notably, statistics show that the youth justice population is largely a subset of the Child, Youth and Family care and protection populace.¹⁷ As such, changes to the Oranga Tamariki Act which work to affirm the mana of young people tangentially function as a form of targeted intervention by which the underlying causes for offending are addressed. The gains are potentially large if children are appropriately handled in the social services sphere and, so, are diverted from offending. The gains include financial savings in the criminal justice system because the number of offenders (both adult and juvenile) would decrease. It is also expected that there would be a reduction in harm to victims, victims' families, offenders' families and each of their communities.¹⁸ So, while the duties of the Chief Executive seem specific, they are, in fact, wide in terms of their effect if carried out thoroughly.

Implementing the duties in s 7AA of the Oranga Tamariki Act thoroughly will require that lawyers, judges, Oranga Tamariki and the Chief Executive possess the cultural capability to deal with iwi and Māori organisations, as well as their associated representatives. As Sharyn Otene notes, radical policy may underlie legislation, but it must be met with radical practice.¹⁹ Radical practice will only be achieved when cultural competency is paramount. If this threshold is met, s 7AA has the potential to assist whānau in being active agents in solutions related to their own children, exemplifying whanaungatanga.²⁰ Moreover, the participation of whānau realises the principles contained in the Act, creating a better response to the care and protection needs of tamariki.

C What Is the Significance of Changes to ss 4, 5 and 13?

Sections 4, 5 and 13 alter both general and specific care and protection principles, and work to recast the purposes of the Oranga Tamariki Act. These changes are

17 Ministry of Social Development *Crossover between child protection and youth justice, and transition to the adult system* (Centre for Social Research and Evaluation, July 2010) (Obtained under Official Information Act 1982 Request to the Ministry of Social Development) at 8.

18 See at 15.

19 Otene, above n 14, at 140.

20 At 146.

significant when considering crossover children because they affirm the inherent nature of their mana, which is one of the purposes espoused in s 4(1)(a)(i).

IV How Have New Legislative Changes Played Out in Practice?

New Zealand Police/Oranga Tamariki v LV saw the recent changes to the Oranga Tamariki Act come to fruition.²¹ The decision concerned a crossover kohine (female adolescent), L, who had 13 charges against her, compounded by the fact that she also had care and protection proceedings before the Family Court. Fitzgerald J discharged all of the charges under s 282 and refused to approve the care and protection plan put forth on the basis that “it does not comply adequately with ss 4, 4A, 5, 7 and 7AA of the Act”.²² His Honour described that “what little” had occurred in the lead up to the proceedings had been “culturally inappropriate and incompetently provided”.²³ His Honour’s reasoning considered both the United Nations Convention on the Rights of the Child and the Treaty of Waitangi, making clear that:²⁴

- (a) the failure to establish relationships to hapū or iwi were contrary to s 5(1)(c);
- (b) the wellbeing of L had not been the first and most paramount consideration with regard to her care and protection, as should have occurred under s 5(1)(b);
- (c) that mana tamaiti and wellbeing should be protected by recognising the whakapapa and whanaungatanga responsibilities of whānau, hapū and iwi, as contained in 5 (b)(iv);
- (d) that mana tamaiti must be considered when exercising a general power that affects young people;

21 *New Zealand Police*, above n 1.

22 At [116].

23 At [48].

24 At [52]–[58], [67] and [82]. See Convention on the Rights of the Child 1577 UNTS 3 (signed 20 November 1989, entered into force 2 September 1990).

- (e) that Treaty principles are relevant and tikanga Māori, as a bare minimum, should be afforded respect; and
- (f) that duties imposed on the Chief Executive should be achieved in a manner that is consistent with ss 4(a) and 5.

Here, amendments to the Act are used to vindicate the inherent mana of children. Importantly, Fitzgerald J likened tamariki to taonga, noting that under the Treaty of Waitangi, Māori are afforded full authority over that which falls into the taonga class.²⁵ It would follow that if children were taonga, then Māori should be guaranteed the exclusive authority to make decisions concerning the welfare of their children. Conferral of decision-making power from the Crown to Māori regarding children would correspond with Te Tiriti's promise of full authority over taonga, which satisfies the principle of active protection. While his Honour complied with the spirit of active protection in utilising the new amendments, he noted that the significant changes made to the Act had not yet "seen improvement in the handling of crossover cases".²⁶ His Honour mused that "the spirit of the amendment needs to become normal practice", and that when the provisions are used appropriately they will achieve much-improved outcomes.²⁷ Until then, the cycle of criminalisation of care and protection will only continue.

V Do the Changes Matter when they Function within an Institutional Framework which has a Historic and Ingrained Disregard for Te Ao Māori?

One has to question whether the utilisation of culturally sensitive processes can truly function within an ideological framework that forces the adoption of the oppressor's consciousness, when that consciousness actually needs to be transformed. Juan Tauri described the phenomenon in which the law appropriates from the dominated — in this instance, Māori — "in order to (re)legitimise ... institutional

25 At [82].

26 At [109].

27 At [110].

practices”.²⁸ If the amendments to the Act which co-opted aspects of tikanga Māori were superficial in their effect, then one might have reason to believe that their inclusion was nothing more than part of an overall sensitisation of policy toward Māori as opposed to an attempt at real change. The question then becomes whether the amendments to the Oranga Tamariki Act are superficial, taking into consideration that they function within a self-limiting framework, or whether despite this they can function in a meaningful way to bring about new results?

The decision of Fitzgerald J seems to be evidence that use of the amendments to the Oranga Tamariki Act can effect meaningful change with regard to crossover children. However, his Honour noted that he is yet to see the *use* and “*spirit* of the amendments” become common practice.²⁹ In fact, the plans provided by both the Youth Court and the Family Court appear to be much the same as they were before the changes, with next to no utilisation of te reo Māori or concepts related to *tikanga*.³⁰ Recalling the comment of Judge Williams, the disparity between the radical policies underlying the legislation, and radical change in practice, is plainly evident.³¹

In order to combat this gap, and achieve meaningful functionality within a system which has been historically oppressive, the judges and lawyers in a particular matter will need to be equipped with information about the mana, whakapapa and whanaungatanga responsibilities that arise in relation to the children and whānau they find before them. In addition, if cultural reports and lay advocates are made more readily available, the information required to make important decisions could be obtained quicker.³² However, both lawyers and judges would need to have the cultural competency to utilise the information provided.

28 Juan Tauri “Family Group Conferencing: A Case-Study of the Indigenisation of New Zealand’s Justice System” (1998) 10 *Current Issues in Criminal Justice* 168 at 172.

29 *New Zealand Police*, above n 1, at [110] (emphasis added).

30 At [110].

31 Otene, above n 14, at 140.

32 At 141.

Ultimately, amendments to the Oranga Tamariki Act could serve as the harbinger for positive change. However, a lot more work will need to be done to ensure these changes have their intended effect.

VI Could Changes to the Oranga Tamariki Act Expand to Encompass Pasifika?

Arguably, s 27 of the Sentencing Act 2002, and the Family Court, each make provision for cultural reports that can speak to a person's cultural background. While Pasifika could utilise this tool instead of looking to the provisions of the Oranga Tamariki Act, it is possible that the essence of the Oranga Tamariki Act provisions could be applied in a way that respects the cultural background of non-Māori before the court. Indeed, mana is inherent to all children and should be affirmed where possible. Similarly, the regard given to the kinship matrix could also apply to those from cultural backgrounds where extended family and village environments are also principal. While ss 5(a) and 5(b) of the Oranga Tamariki Act translate with a degree of ease, s 7AA does not, and for good reason. It is designed to target the disparities experienced by Māori as a result of a distressing colonial history, with particular regard to the Treaty of Waitangi and its principles. Because the legislative intent is to address and improve outcomes for Māori, s 7AA is incapable of extension. One might proffer that an alternate provision be added to target other minority groups. However, this could frustrate the rightful focus on Māori.

VII Has Oranga Tamariki Earned its Name?

When Child, Youth and Family changed its name to Oranga Tamariki, it did so because it wanted to denote a sense of wellbeing, while reminding itself and others that children are descended from greatness with "inherent mana".³³ Hinemoa Elder refused the rebrand, stating that there was "precious little about oranga (well-being) and little

33 Oranga Tamariki "About Us" <www.orangatamariki.govt.nz>.

— if any — understanding about tamariki”.³⁴ One cannot ignore the fact that, historically, Oranga Tamariki as an institution robbed whānau, hapū and iwi of abilities which the amendments to the Oranga Tamariki Act now assert are essential entitlements. While the new amendments serve to vindicate the mana of crossover children, they do not erase a history which has trampled on that mana. Oranga Tamariki has not yet earned its name, but it is not precluded from doing so if the changes to the Act are implemented competently. Ultimately, amendments to the Act have the ability to positively affect Māori crossover children and affirm the principles and commitments contained in the Treaty of Waitangi.

34 Hinemoa Elder “Oranga Tamariki is doing more harm than good” (19 May 2019) Stuff <www.stuff.co.nz>.