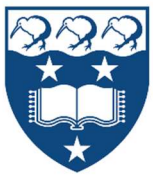
DETERMINING THE BEST INTERESTS OF TAMARIKI MĀORI IN NEED OF CARE AND PROTECTION

DECEMBER 2022

Te Puna Rangahau o te Wai Ariki | Aotearoa New Zealand Centre for Indigenous Peoples and the Law



UNIVERSITY OF AUCKLAND
Waipapa Taumata Rau
NEW ZEALAND

AUCKLAND LAW SCHOOL

1. OUR CORE CONCERN

Tamariki Māori (Māori children) have a right to be raised by their whānau (family) and within their culture. This right is guaranteed under te Tiriti o Waitangi (te Tiriti) and protected by the United Nations Declaration on the Rights of Indigenous Peoples (Indigenous Declaration) and the United Nations Convention of the Rights of the Child (CRC). Māori rangatiratanga (authority) over kāinga – authority to determine what is in the best interests of their communities, including tamariki Māori – is also guaranteed under te Tiriti and protected by the Indigenous Declaration.

Too often, however, these rights and guarantees are not recognised or given effect in Aotearoa New Zealand. A key example, as explored in this report, is in the Family Court, which often makes decisions that see tamariki Māori in need of care and protection placed outside of their whakapapa (i.e. outside of their kin group) and disconnected from their culture. This situation is occuring for a range of reasons, including that:

- the law, despite being amended multiple times to better recognise the rights of tamariki Māori to live within their whakapapa group and be connected to their culture, still fails to clearly prescribe how the Family Court should give effect to these rights;
- in practice, whānau, hapū and iwi are not actively engaged by Oranga Tamariki or the Courts to ensure that all tamariki Māori in need of care and protection are always placed within their whakapapa group; and
- Māori rangatiratanga to determine what is in the best interests of tamariki Māori, as guaranteed under te Tiriti and affirmed by the Indigenous Declaration, is not recognised or given effect in care and protection law, policy and processes within Aotearoa New Zealand.

To ensure the rights of tamariki Māori to live with their whānau and within their culture, as guaranteed under te Tiriti and protected by the Indigenous Declaration and the CRC, and Māori rangatiratanga over kāinga is given effect it is essential that:

- Aotearoa New Zealand's care and protection law, policy and processes are reformed to centre the jurisdiction for the care and protection of tamariki Māori with Māori.
- Until Māori rangatiratanga over the care and protection of tamariki Māori is recognised, legislative amendment and practice change is required to:
    - provide a distinct best interest standard for tamariki Māori to be applied by decision-makers to ensure that they are always placed within their whakapapa group; and
    - require the Courts to facilitate the active involvement of whānau, hapū and iwi in care and protection proceedings, at the earliest opportunity, to ensure that they are involved in decision-making about what is in the best interests of their tamariki Māori and that tamariki Māori are always placed with their whakapapa group.

2. INTRODUCTION

The purpose of this paper is to explore how the especial rights of tamariki Māori in need of care and protection (as derived from te ao Māori, te Tiriti, the Indigenous Declaration and the CRC) are realised in Aotearoa New Zealand. Specifically, it examines how the Family Court determines the best interests of tamariki Māori in need of care and protection within the current legislative settings and by looking to international jurisdictions.

This analysis is prompted by the "Moana case", which has attracted significant public attention and raised questions around whether Aotearoa New Zealand's care and protection legislation, the Oranga Tamariki Act 1989 (OTA), is fit for purpose when it

comes to determining what is in the best interests of tamariki Māori, and who should be making these decisions.

To answer these questions, we look first at the case law involving best interest determinations and tamariki Māori to better understand how the law is being interpreted and applied in relation to their circumstances. We examine if: the law is working for tamariki Māori and their whānau or if judicial interpretations of the current legislation highlight a need for a different legal test for tamariki Māori; further legislative amendment is required to make it clearer to judges both how to apply the current legal test in relation to tamariki Māori and whose expert opinion should be sought on the matter; or, it is instead more about who is best placed to decide these cases e.g. Māori judges with a knowledge of tikanga and te ao Māori.

We overlay this analysis with an overview of the rights of tamariki Māori, as they relate to care and protection, under te Tiriti, the Indigenous Declaration and the CRC.

We then turn internationally, to look at how the care and protection of Indigenous children are managed in other contexts to inform our thinking on how the care and protection laws and systems could be improved in Aotearoa New Zealand to better provide for tamariki Māori and their whānau.

From this three-fold analysis, we conclude that Aotearoa New Zealand's care and protection framework, as it relates to tamariki Māori, is inadequate for the following key reasons:

- First and foremost, it fails to recognise the inherent jurisdiction of Māori to care for and protect tamariki Māori and determine what is in their best interests.
- The OTA does not provide clear direction on how the best interests of tamariki Māori should be determined in a way that recognises their rights under te Tiriti, the Indigenous Declaration and the CRC or the right of Māori to determine what is in the best interests of their children, as guaranteed under te Tiriti and affirmed by the Indigenous Declaration.
- There are currently inconsistencies in how the best interests of tamariki Māori are determined by Courts. While these inconsistencies mainly arise because the law is unclear and does not provide a distinct test for determining the best interests of tamariki Māori, another key issue is that often the judges who are making these determinations do not have knowledge of tikanga Māori and te ao Māori or fail to seek the relevant expertise to assist their decision-making on these matters. The net effect is that the rights of tamariki Māori frequently do not receive adequate consideration, with tamariki Māori often placed in non-whakapapa care, which violates their right to be raised by their own family and within their own culture.
- The governing legislation is missing the appropriate mechanisms and checks and balances to ensure that Oranga Tamariki and the courts always place tamariki Māori in the care of their whānau, hapū or iwi and that their whānau, hapū or iwi are actively involved in any proceedings involving tamariki Māori.
- Aotearoa New Zealand's laws, policy and processes as they relate to the care and protection of tamariki Māori are in need of reform when compared to the approaches taken to Indigenous child welfare in other jurisdictions, which recognise the inherent jurisdiction of Indigenous peoples in these matters and provide stronger checks and balances to ensure Indigenous children remain in the care of either their family or wider collective.
- There are significant systemic and resourcing issues in both Oranga Tamariki and the Courts that also need to be addressed, in addition to jurisdiction and legislative change, to ensure the rights, wellbeing and best interests of tamariki Māori are fulfilled.

3. KEY BACKGROUND

3.1 Tamariki Māori and New Zealand's care and protection system

As experienced by other Indigenous cultures around the world, tamariki Māori are overrepresented in Aotearoa's State care system: as at March 2022, 68 percent of children in state care were Māori;[1] 76 percent of children harmed while in state care from July 2020 to June 2021 were Māori;[2] and, in 2019 pēpi Māori (Māori babies) were five times more likely to be taken into state custody than non-Māori babies.[3] This is a situation that has persisted across decades and is linked to colonisation and a failure to honour te Tiriti.

The high removal rate of tamariki Māori into state care is a topical issue in Aotearoa, brought to fore by the highly publicised 'uplift' of a newborn pēpi Māori in 2019. The removal triggered five high-level reviews and inquiries into Oranga Tamariki and its removal policies and practices relating to tamariki Maori.[4] Overall, these reviews found that tamariki Māori were removed by the state at a much higher rate than non-Māori children, that removals powers were often used in non-urgent cases, removals were made at short notice and without adequate or timely consideration of alternative options, and with little or no involvement of whānau. Additionally, actors within the state care system – from social workers through to the judiciary – frequently lack the cultural capacity or appropriate training, tools and guidelines to work effectively with Māori whānau and to protect their Tiriti and Indigenous Declaration rights to maintain family unity and connection to culture.

The majority of these reviews called for a complete overhaul of the Oranga Tamariki system and a wholescale transformation in approach, which sees the transfer of responsibility, resources and power to Māori so they lead on deciding how to best manage the care and protection of tamariki Māori according to te ao Māori.[5]

Despite these resounding calls for change, the Government shows no signs of providing for Māori tino rangatiratanga over the care and protection of tamariki Māori. Instead, the Government has developed a 'Future Direction Plan' for Oranga Tamariki, which states that "there will always be a need for a state care and protection agency for all tamariki in New Zealand".[6] While the Plan commits Oranga Tamariki to "be an enabler and co-ordinator for Māori and communities" and "to empower [Māori] to put in place the support, the solutions and the services that they know will work for their people", the stated intention or implication is that Māori will co-design and co-lead initiatives with Oranga Tamariki rather than exercise sole authority.

3.2 Key provisions of the OTA relating to the care and protection of tamariki Māori

Whether tamariki Māori are taken into care is a matter that is governed by legislation and determined by the Family Court.

---

[1] This figure also includes 11 percent of children who identify as 'Māori Pacific'. See https://www.orangatamariki.govt.nz/about-us/performance-and-monitoring/quarterly-report/care-and-protection-statistics/

[2] This figure also includes 13 percent of children who identify as 'Māori Pacific'. See https://www.orangatamariki.govt.nz/assets/Uploads/About-us/Performance-and-monitoring/safety-of-children-in-care/2020-21/SOCiC-AR-2021-FA.pdf

[3] See Infographic – Pēpi Māori 0-3 Months And The Care And Protection System.

[4] These inquiries include an Oranga Tamariki's internal practice review, the Māori-led Inquiry into Oranga Tamariki, the independent inquiries of the Children's Commissioner and the Chief Ombudsman, and the Waitangi Tribunal's urgent inquiry into Oranga Tamariki.

[5] See Oranga Tamariki beyond repair and needs careful replacement, Waitangi Tribunal told | Stuff.co.nz

[6] See https://www.orangatamariki.govt.nz/assets/Uploads/About-us/News/2021/MAB-report-action-plan-release/OT-Future-Direction-Action-Plan.pdf

Aotearoa's care and protection legislation has gone through significant reform over the past 30 years in an attempt to recognise and protect the place of tamariki Māori in Māori culture. These reforms were sparked by the ground-breaking Pūao-te-Ata-Tū report in 1986,[7] which triggered amendments to the Children, Young Persons, and Their Families Act 1989 to require decision-makers to see tamariki Māori not in isolation but in the context of their wider whānau, hapū and iwi, to ensure that connections of whānau, hapū and iwi were maintained and strengthened, and for Māori to be involved in decisions affecting their children. However, while these reforms were revolutionary, they were largely not reflected in practice and after a series of reviews further amendments were made to the legislation, now the OTA, in 2019 to re-emphasise and expand the importance of tikanga Māori and te Tiriti when administering the OTA.[8]

The 2019 amendments to the OTA placed renewed emphasis on the place of tamariki Māori within whānau, hapū and iwi and the duty on decision-makers to ensure that this relationship is maintained and strengthened wherever possible. The 2019 amendments also introduced more explicit references to te ao Māori and tikanga Māori concepts that required decision-makers to recognise, respect and promote the mana tamaiti and whakapapa of tamariki Māori as well as the whanaungatanga responsibilities of their whānau, hapū and iwi.

These concepts are defined in section 2 of the OTA as follows and are incorporated into key sections of the OTA, including sections 5, 13 and 7AA:

- **mana tamaiti (tamariki)** means 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
- **whakapapa**, in relation to a person, means 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
- **whanaungatanga**, in relation to a person, means— (a) the purposeful carrying out of responsibilities based on obligations to whakapapa: (b) the kinship that provides the foundations for reciprocal obligations and responsibilities to be met: (c) 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

For the purposes of this paper, we now refer to these provisions as te ao Māori principles.

The 2019 amendments also included, for the first time in the history of Aotearoa's care and protection legislation, explicit references to te Tiriti and the ways Oranga Tamariki must give effect to it, including by developing policies, practices and services that reduce disparities for tamariki and rangatahi Māori and promote the OTA's te ao Māori principles. The OTA also requires the Chief Executive to seek to develop strategic partnerships with iwi and Māori organisations to achieve these ends.

---

[7] See Pūao-Te-Ata-Tū (Day break): the Report of the Ministerial Advisory Committee on a Maori Perspective for the Department Of Social Welfare (1988). The task of the Committee was to advise the Minister on how the Department could meet the needs of Māori in policy, planning and service delivery and its recommendations were based upon feedback gathered in hui around the country. The report recognised that the social issues facing Māori resulted from failing systems of state provision underpinned by a broader context of colonisation, racism and structural inequality. For further background, please see Boulton, A., Levy, M. & Cvitanovic, L. (2020). Beyond Pūao-Te-Ata-Tū: Realising the Promise of a New Day.

[8] Otene, Judge S. *Te Hurihanga Tuarua? - Examining Amendments to the Oranga Tamariki Act 1989 that took effect on 1 July 2019.* (2019) 9 NZFLJ 139.

3.3 The "Moana" case[9]

In 2018, Oranga Tamariki placed a Māori girl, referred to as "Moana" in the media, into the temporary care of Pākēha caregivers. In 2019, Oranga Tamariki became concerned that Moana's cultural needs where not being met by her Pākēha caregivers and decided to explore placing her with caregivers from her iwi, who were also looking after Moana's younger brother. In response, Moana's Pākēha caregivers applied to the Family Court seeking guardianship. The Chief Executive of Oranga Tamariki opposed those orders, and supported orders that the child be placed with caregivers with whakapapa connections to the child.

When the case was heard in the Family Court, Judge Callinicos awarded custody of Moana to her Pākēha caregivers. He considered the provisions of the OTA that require the Courts to take into account cultural considerations when determining what orders would be in the best interests of a Māori child; however, Judge Callinicos noted these provisions do not trump other key considerations and ultimately decided not to change Moana's caregiving arrangements due to the unknown extent to which her social, emotional and psychological welfare might be harmed if she was removed from her current caregivers. He made orders confirming Moana's placement with her current caregivers, while also granting additional guardianship responsibilities and an access order to the iwi caregivers so they were also involved in her care.

In his judgment, Judge Callinicos was also highly critical of Oranga Tamariki, particularly its failure to identify a whakapapa placement for Moana from the outset and its attempt to rectify this by now enacting what was termed a "reverse uplift".

Judge Callinicos' decision attracted significant media attention and was appealed to the High Court on several grounds, including that he had "failed to consider and/or misapplied the statutory cultural provisions of the OT Act, making the Family Court decision non-compliant with Māori tikanga and Treaty obligations."[10]

The appeal was heard by the High Court in May 2022 with Justice Cull releasing her decision, dismissing the appeal, in November 2022.[11] Justice Cull found that Judge Callinicos did not err in his application of the statutory principles of the OTA to the facts of this case; however, she acknowledged his description of the legislative directives in his judgment may have given rise to the potential perception that the well-being and best interests of the child must be assessed separately from the whānau or kinship group, where the views are in conflict.[12]

Justice Cull clarified that the best interests of the child is the paramount consideration and that this must be assessed holistically by applying the section 5 and 13 principles. She confirmed that the OTA provides a strong directive that wherever possible the relationship between a Māori child and their kinship group should be maintained and strengthened.[13] However, Justice Cull emphasised that giving effect to this preference was not possible due to the specific facts of this case - Moana had not been placed with her kinship group at the earliest opportunity; instead Oranga Tamariki had placed her outside whakapapa care from the outset; and, Moana had now lived with her current caregivers for over four years and formed strong attachments. Justice Cull was therefore of the view that it was

[9] *Chief Executive of Oranga Tamariki v MQ* [2021] NZFC 9089.
[10] *Moana's Mother v Smith & Chief Executive of Oranga Tamariki Ministry for Children & Taipa* [2022] NZHC 2934 at 19(1).
[11] *Moana's Mother v Smith & Chief Executive of Oranga Tamariki Ministry for Children & Taipa* [2022] NZHC 2934.
[12] Ibid at 73.
[13] Ibid at 36.

not in Moana's best interests to be removed from her current caregivers and placed in whakapapa care.[14] The fact that Moana's proposed whakapapa caregivers, the Taipas, recognised the importance of maintaining safe and nurturing attachments, had "stressed they did not seek a reverse uplift",[15] and that all parties were open to developing a co-operative partnership agreement, which would enable Moana to maintain links with her whānau and culture, were also key factors in Justice Cull's decision. Justice Cull also noted the "strong and justified criticism" of Oranga Tamariki's inadequate inquiries about Moana's kinship group[16] and that this case had largely come about because Oranga Tamariki had failed to identify a safe whakapapa placement for Moana at the earliest opportunity.[17] Justice Cull stated that, "[p]lainly, preparation for a placement of a Māori child in the future needs to be accompanied by adequate inquiries and research into the child's wider family and kinship group."[18] At the end of her judgment in reference to her decision to dismiss the appeal, Justice Cull reiterated that, "…each case must be determined on its facts. No one size fits all. The facts and circumstances surrounding Moana were determinative of the outcome of this case."[19]

4. ANALYSIS OF RELEVANT CASE LAW

Over the past three years, the 2019 amendments to the OTA have begun to be tested by the Courts. We have undertaken a preliminary analysis of this emerging case law, focussing on how the courts have interpreted and applied the OTA's te ao Māori principles when making best interests determinations involving tamariki Māori in need of care and protection.[20] The primary purpose of this analysis is to identify if the 2019 amendments are having their intended effect and, if not, what is not working and if there is a need for further law reform or practice change, or both.

The leading authorities on this issue are the *Moana* High Court decision and *McHugh*, another High Court decision from June 2022, which considered the correct approach for the Court to adopt when considering whether to grant an application for special guardianship of tamariki Māori.

4.1 Key provisions of the OTA that guide determinations of care and protection

Before we turn to the case law, we outline the key provisions of the OTA that guide the Court's decision-making process.

The Family Court ultimately decides if a child is in need of care and protection and can make a variety of orders to ensure they are looked after. Under section 4A(1) of the OTA, when the Court is deciding what action to take, the best interests of the child must be its first and paramount consideration. This is commonly referred to as the paramountcy principle.

The OTA sets out how the Courts are to determine what is in the best interests of a child in need of care and protection. In particular, the Court must be guided by the principles

[14] Ibid at 73 and 74.
[15] Ibid at 131 and 135.
[16] Ibid at 65.
[17] Ibid at 75.
[18] Ibid at 65.
[19] Ibid, para 207.
[20] To find relevant cases, the keyword phrase "mana tamaiti" and a date range of 2019 to July 2022 was used to search case law databases. We mainly limited our review to cases from the Family Court or appeals of Family Court cases to the High Court. We note there is also relevant case law on "mana tamaiti" from the Youth Court (specific to Part 4 of the OTA). While we have included references to some of these cases, Youth Court decisions were not comprehensively reviewed for the purposes of this paper.

set out in sections 5 and 13, which capture the key elements that constitute a child's well-being and best interests. We set out these sections in full at Appendix A.

To determine what course of action would be the most favourable for a child's well-being and best interests, the Court must undertake a balancing process where the relevant facts of the case, the circumstances of the child and the section 5 and 13 principles are considered and weighed. The relevance and importance of each principle, and which principles come to the fore, will differ depending on the child's circumstances.[21]

4.2 The Courts' balancing process in relation the best interests of tamariki Māori

From our analysis of relevant cases in which the Court was required to determine what course of action would be in the best interests of tamariki Māori, three key themes emerged:

- Judges had differing views on how the Court should balance te ao Māori principles while also giving effect to the paramountcy principle when making best interest determinations for tamariki Māori.
- Judges had differing views on what weight should be given to te ao Māori principles when determining what course of action would be in the best interests of tamariki Māori.
- Judges had differing views on what relevant information must be provided to the Court in relation to te ao Māori principles before it could make a decision.

The paramountcy principle and te ao Māori principles – balancing and weighting

How to reconcile the legislation's directive that a child's well-being and best interests must be the first and paramount consideration of the Court with its obligation to also recognise and promote te ao Māori principles has emerged as one of the most difficult issues that judges grapple with.

Where the tension lies is that some judges see the OTA's te ao Māori principles as one of a number of things they must consider when determining what course of action would most effectively provide for the well-being and best interests of tamariki Māori. For example, in the *Moana* Family Court case, while Judge Callinicos acknowledged that the 2019 amendments have "reframed and strengthened many cultural considerations", he was of the view that no particular principle has been "legislatively mandated to trump another" and, as a consequence, te ao Māori principles should not be given priority over other principles.[22] Similarly, in *Re WH*, Judge Southwick was of the view that giving greater weight to te ao Māori principles "would have the effect of demoting the paramountcy rule."[23] As the OTA also requires that the Court considers the child holistically and take into account a variety of their characteristics (including but not limited to their whakapapa and cultural identity),[24] this appears to have bolstered some judges' approach to see a child's cultural identity as just one factor that requires the Court's consideration.[25] Judge Southwick also expressed the view that the OTA does not demand that the Court in some

[21] *B v Department of Social Welfare* (1998) 16 FRNZ 522.
[22] *Chief Executive of Oranga Tamariki v MQ* [2021] NZFC 9089 at 57.
[23] *Re WH* [2021] NZFC 4090 at 70(a).
[24] For example, section 5(1)(b)(vi) calls on the court to also consider factors such a child's developmental potential, educational and health needs, gender identity, sexual orientation, disability and age.
[25] *Re WH* [2021] NZFC 4090 at 70(a); *Chief Executive of Oranga Tamariki v MQ* [2021] NZFC 9089 at 57.

way implements te ao Māori principles but rather requires the Court to simply recognise and respect those values.[26]

Other judges took a different approach and saw protecting the mana tamaiti of tamariki Māori as a key element of their well-being and best interests and were of the view that in order to give effect to the paramountcy principle, te ao Māori principles should be given priority and weighted accordingly when the Court is making determinations about what is in the best interests of tamariki Māori. For example, in the *BH* case, Judge Otene expressed the view that considering the number of principles in sections 5 and 13 that refer to te ao Māori concepts, the balance of the principles "weigh with heft in favour of the well-being of children being entwined with the well-being of their whānau and best assured when responsibility for their care rests primarily with their family, whānau hapū or iwi."[27] In cases where an order is sought that could significantly impact on the mana, whakapapa and whanaungatanga aspects of a child's well-being (such as special guardianship orders), these principles must be given a heavier weighting.[28] Judge Courtney in *AR* also noted that when the Court is considering and balancing the principle that a child must be protected from harm, this principle encompasses more than physical harm and whether a course of action could put the child at risk of cultural harm must also be taken into account.[29]

On considering the differing approaches in *Re WH* and *BH*, the High Court in *McHugh* confirmed the approach in *BH* as correct and that the Court should substantively apply te ao Māori principles rather than merely recognise and respect them.[30] Justice Doogue, referring to the Supreme Court case *Kacem v Bashir*,[31] clarified that the principles in sections 5 and 13 are to be given different weightings depending on the circumstances of the child.[32] On the question of whether prioritising a principle would have the effect of demoting the paramountcy principle, Justice Doogue clarified that the principles in sections 5 and 13 do not sit separately from the paramountcy principle. Rather they serve to set out the factors that Parliament has recognised as the constituent elements of a child's well-being so having regard to those principles "does not demote the paramountcy principle but exercises it" and is "precisely how the Act is to be applied."[33] The Waitangi Tribunal, in its recent report on Oranga Tamariki, also recognised there should be no tension between the OTA's paramountcy principle and te ao Māori principles. The physical, social and spiritual wellbeing of tamariki Māori is inextricably related to their sense of belonging to a wider whānau group so, in preserving the continued connection of tamariki Māori with their whakapapa group, the Court is also promoting their well-being and best interests.[34]

On the question of how much weighting should be given to the OTA's te ao Māori principles, Justice Doogue, after undertaking a careful analysis of the language used in the relevant sections of the Act,[35] concluded that the OTA's use of substantive terms, such as "protect", "maintain", "strengthen", "preserve" and "honour" mandates the Court (and Oranga

[26] *Re WH* [2021] NZFC 4090 at 70(d).
[27] *Chief Executive of Oranga Tamariki v BH* [2021] NZFC 210 at 21.
[28] Ibid at 39.
[29] *Chief Executive of Oranga Tamariki v AR* [2020] NZFC 4046 at 241.
[30] *McHugh v McHugh* [2022] NZHC 1174 at 116.
[31] *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1.
[32] *McHugh v McHugh* [2022] NZHC 1174 at 89.
[33] *McHugh v McHugh* [2022] NZHC 1174 at 83-93.
[34] Waitangi Tribunal. (2021). He Pāharakeke, he Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry, pp. 149-152.
[35] *McHugh v McHugh* [2022] NZHC 1174 at 94-112.

Tamariki) to take active steps to promote the values of mana tamaiti, whakapapa and whanaungatanga in the well-being and best interests of tamariki Māori.[36]

> *Reading the Act as a whole and applying a purposive interpretation, the legislation heavily emphasises the importance of whānau connections and relationships, and is weighted toward honouring the child's place within their whānau (and hapū, iwi and family group) and providing an ongoing role for whānau in the child's life to the greatest extent possible consistent with the child's well-being and best interests.*[37]

Justice Cull, in her *Moana* High Court decision, also confirmed that the OTA provides a strong directive that wherever possible the relationship between a Māori child and their kinship group should be maintained and strengthened,[38] even though she ultimately found that the OTA no longer "mandates" that Moana should be placed with whakapapa caregivers "as a matter of preference" considering Moana's specific circumstances, including the amount of time that had passed and Moana's strong attachments to her current caregivers.[39]

> *A Māori child's safety and her well-being, therefore, must be assessed with a te ao Māori lens by giving preference to her kinship and whanau connections. The preference is a placement with whānau, hapū or iwi, provided the other factors of a safe, stable and loving family home can be met from the earliest opportunity.*[40]

Determining if te ao Māori principles have been met

Another key aspect of the emerging case law is how the Courts determine whether te ao Māori principles have been satisfied in relation to tamariki Māori. Key issues include what evidence they rely on and deem satisfactory when making these determinations and whether they also call on experts in tikanga Māori and te ao Māori to assist them.

The Court's determination of whether the whakapapa principle has been satisfied is a key example. In some cases, the Court was of the view that it could only make decisions based on the evidence put before it on whether a whakapapa placement could be found or not rather than seek its own evidence on the matter. For example, Judge Southwick took the view in *Re WH* that, "[the] Court can only protect and maintain something that can be identified as existing, not something that should exist."[41] Invariably, the only evidence put before the Court are the whakapapa investigations undertaken by Oranga Tamariki. The capacity of Oranga Tamariki to thoroughly investigate whether there were placement options beyond a child's whānau group, such as within the child's hapū or iwi has been criticised,[42] however, as has the failure of the courts to properly investigate this point.[43] Despite the aspirations of section 7AA, which provides that Oranga Tamariki must develop policies, practices and services that have regard to te ao Māori principles and the Chief Executive must seek to develop strategic partnerships with iwi and Māori organisations to achieve these ends, it appears that Oranga Tamariki does not reach out to iwi authorities in a systematic manner to identify whakapapa placement options for tamariki

---

[36] Ibid at 95 and 112.
[37] Ibid at 111.
[38] *Moana's Mother v Smith & Chief Executive of Oranga Tamariki Ministry for Children & Taipa* [2022] NZHC 2934 at 36.
[39] Ibid at 68.
[40] Ibid at 55.
[41] *Re WH* [2021] NZFC 4090 at 70(f).
[42] *Chief Executive of Oranga Tamariki v TB* [2020] NZFC 4271; *Chief Executive of Oranga Tamariki v MQ* [2021] NZFC 9089; *Moana's Mother v Smith & Chief Executive of Oranga Tamariki Ministry for Children & Taipa* [2022] NZHC 2934.
[43] Cleland, A. *Protection of mana tamaiti (tamariki): the right to cultural connectedness.* (2021) 10 NZFLJ 141 at 148-149.

Māori in need of care and protection nor do the courts require that this investigation has occurred before making orders that place tamariki Māori in non-whakapapa care.

Considering how crucial securing whakapapa placements are to protecting the well-being and best interests of tamariki Māori, the Court should ensure it has comprehensive information before it prior to making a final determination. The Court does have statutory mechanisms available to satisfy itself that all avenues have been exhausted or it can refuse to decide the matter unless adequate evidence is provided to the court. For example, a representative from a child's whānau or family group or an iwi social service or cultural social service is entitled to attend proceedings.[44] The judge has the power to grant leave to these representatives, or any other person, to make representations on behalf of the child.[45] Under section 163, the court can also appoint a lay advocate "to ensure that the court is made aware of all cultural matters that are relevant to the proceedings". The lay advocate can also represent the interest of the child's whānau, hapū or iwi, call witnesses and request reports. The Court also has the power to request cultural or community reports before it makes care and protection orders to better understand a child's cultural background and what community resources might be available to assist the child or their whānau or family group.[46] At the same time, a child, their caregivers or their legal representative can also request that the Court obtains a cultural or community report.

Justice Doogue in *McHugh* confirmed the OTA places a duty on Oranga Tamariki and the courts to thoroughly investigate a child's whakapapa and make every effort to find a whakapapa placement. Justice Doogue found that Oranga Tamariki is under a duty to "cast the net wide" to identify people within the child's wider collective with whom the child could be placed and ensure "best efforts had been made on behalf of the child to promote the child's long-term sense of identity and whakapapa."[47] When this evidence is not adequately provided, there is a duty on the Court to obtain it, either through "a cultural report, community report, the appointment of a lay advocate to ensure the Court is aware of cultural matters, or direct precedential guidance from authorities that have considered the application of tikanga to child law (and analogous guidance from the application of tikanga in other spheres)."[48] Otherwise, this information can be directly presented to the Court by the child's whānau, hapū or iwi.[49]

In the absence of this information, the Court would be correct to find that it does not have sufficient information to decide and either refuse to make the orders or defer its decision until further investigations are undertaken and the requisite information is provided to the Court.[50] Judge Fitzgerald in *LV* also noted that he is yet to see the "profoundly important changes"[51] to the OTA, as they relate to tamariki Māori, comprehensively reflected in practice. In particular, he expressed the view that Oranga Tamariki needs to more consistently and meaningfully demonstrate how it is giving effect to te ao Māori principles and the rights of tamariki Māori under te Tiriti, the Indigenous Declaration and the CRC in the care plans it devises for tamariki Māori and ensure that in addition to whānau, a child's hapū and iwi are also involved in key meetings relating to their care and protection. In tandem, the Courts should also be monitoring that Oranga Tamariki is complying with its obligations under the OTA before making decisions.[52]

The Moana case suggests, however, that the OTA may need to be amended to clearly spell out what information the Court requires before it can make orders in relation to tamariki Māori, along with what weight the Court should place on evidence from cultural experts

[44] Section 166.
[45] Section 169.
[46] Section 187.
[47] *McHugh v McHugh* [2022] NZHC 1174 at 113 and 137.
[48] Ibid at 131.
[49] Ibid at 144.
[50] Ibid at 130-131.
[51] *New Zealand Police/Oranga Tamariki v LV* [2020] NZYC 117 at 43.
[52] *New Zealand Police/Oranga Tamariki v LV* [2020] NZYC 117; *New Zealand Police v JV* [2021] NZYC 248.

and iwi representatives. The Family Court in the Moana case considered evidence from a cultural report writer and a letter from the chairman of the child's iwi, which said that every tamariki of that iwi must be cared for within the iwi. While acknowledging the mana of the iwi, Judge Callinicos found that until Parliament gives statutory effect to the view that iwi must determine the placement of a Māori child, the Court must make the holistic assessment required by the OTA.[53]

The *Moana* High Court decision also underscores the tension that exists between the need to undertake thorough whakapapa investigations and the need to ensure a child is placed in a safe environment at the earliest opportunity. As we will discuss in more detail below, this tension could be resolved if Māori led on determining what course of action is in the best interests of tamariki Māori (as they would invariably always be placed in whakapapa care) or if Oranga Tamariki proactively worked with Māori to identify whakapapa placements in advance so that matching tamariki Māori in need of care and protection with whakapapa caregivers could happen at the earliest opportunity.

Beyond whakapapa placement evidence, in general, if the Court is not expert in te ao Māori and tikanga Māori, it should also seek expert evidence or advice to assist its consideration of whether te ao Māori principles have been met in relation to a particular child. As evidenced in some cases, the mana, whakapapa and whanaungatanga aspects of a child's well-being were seen to be protected if that child was still able to maintain some form of cultural connection (e.g. learn te reo Māori, attend kapa haka classes) and maintain links with whānau.[54] In cases where tamariki Māori were put in non-whakapapa placements, it is questionable whether te ao Māori principles were satisfied. In these decisions, the Court failed to appreciate that not only should tamariki Māori be aware of their whakapapa and connected to their culture, they should also be living this experience within their whānau, hapū and iwi.

When it comes to seeking expert psychological evidence to determine what course of action is in the best interests of tamariki Māori, there is also a question of whether only Māori psychologists or psychologists who have the requisite knowledge of tikanga Māori and te ao Māori should be engaged to assess a child's psychological state and level of attachment, especially when it is a key deciding factor like in the *Moana* case. As demonstrated in the *Moana* case, non-Māori psychologists or psychologists who do not have the requisite knowledge of tikanga Māori and te ao Māori are not in a position to assess and provide expert advice on whether tamariki Māori are at risk of being psychologically harmed from a te ao Māori and tikanga Māori perspective, including in relation to the longer-term psychological impacts of not being brought up by their kin group.

5. OVERLAYING TE TIRITI, THE INDIGENOUS DECLARATION AND THE CRC

When considering what is in the best interests of tamariki Māori and what weighting to give te ao Māori principles under the Act, the Courts and Oranga Tamariki should also take into the account the rights of tamariki Māori under te Tiriti, the Indigenous Declaration and the CRC.

As we explore in further detail in our recent report on the rights of tamariki Māori,[55] tamariki Māori hold a distinct set of rights as tangata whenua, Tiriti partners, Indigenous peoples, and children, which require specific recognition and protection. These rights go to the heart of their well-being and best interests and must be protected. When these rights are taken into account, it is clear that the Court should be giving significant weight to te ao Māori principles when making best interest determinations for tamariki Māori.

---

[53] *Chief Executive of Oranga Tamariki v MQ* [2021] NZFC 9089 at 242.
[54] *Re WH* [2021] NZFC 4090; *Chief Executive of Oranga Tamariki v MQ* [2021] NZFC 9089 at 242.
[55] Te Puna Rangahau o te Wai Ariki | Aotearoa New Zealand Centre for Indigenous Peoples and the Law. (2022). Thematic Report: the Rights of Tamariki Māori in Aotearoa New Zealand.

5.1 Te Tiriti, the Indigenous Declaration and the CRC

The rights of tamariki Māori to be raised by their families and within their culture, and the authority of Māori to decide what is in their best interests, is guaranteed under te Tiriti and protected under the Indigenous Declaration and the CRC.

In the context of children and family, te Tiriti guaranteed Māori the right to live as Māori and care for and protect their tamariki in accordance with te ao Māori and tikanga Māori. As part of these protections, te Tiriti guaranteed tamariki Māori the right to be raised within their culture and by their own people in accordance with tikanga Māori. This has been affirmed by the Waitangi Tribunal, which found in its recent report on Oranga Tamariki that te Tiriti guaranteed Māori tino rangatiratanga over kāinga, which, in simple terms, means that Māori have the right to exercise authority over our communities, including the care and protection of our tamariki, with minimal Crown intervention.[56] The Waitangi Tribunal also found that the government's assumption that it has authority over the care and protection of tamariki Māori was a significant intrusion on Māori tino rangatiratanga over kāinga and that it must now step back and allow Māori to reclaim this space.

The Indigenous Declaration, which the Government endorsed in 2010, and the CRC, which New Zealand ratified in 1993, also recognises and protects the rights of tamariki Māori to be raised by their families and within their culture. Additionally, the Indigenous Declaration recognises the authority of Indigenous peoples to decide what is best for their children, consistent with the rights of the child, and to carry out these decisions according to their own culture and laws.[57]

The OTA provides that te Tiriti, the CRC and the Indigenous Declaration should be given effect by decision-makers.

For the first time in the history of Aotearoa New Zealand's care and protection legislation,[58] the OTA explicitly references te Tiriti and attempts to give effect to its principles in the following ways:

- The Act explicitly recognises that one of its key purposes is to "promote the well-being of children, young persons, and their families, whānau, hapū, iwi, and family groups by…providing a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi) in the way described in this Act."[59]
- As already outlined above, the incorporation of te ao Māori principles in the OTA is an attempt to reflect the rights of tamariki under te Tiriti and the guarantee of Māori tino rangatiratanga over kāinga.
- Section 7AA is another key example of how the OTA attempts to give effect to te Tiriti. It requires the Chief Executive of Oranga Tamariki to develop policies, practices and services with the objectives of reducing disparities for tamariki and rangatahi Māori and having regard to their mana tamaiti and whakapapa, and the whanaungatanga responsibilities of their whānau, hapū and iwi. The Chief Executive must also seek to develop strategic partnerships with iwi and Māori organisations to achieve these ends. The Chief Executive is required to report annually on the measures taken to discharge these duties and how the impact of those measures on improving outcomes for tamariki and rangatahi Māori.

Whether these provisions of the OTA are up-to-the mark has been criticised by the Waitangi Tribunal, however. It found that the OTA's te Tiriti clause could be stronger and should clearly state that the Crown must come comply with its Tiriti obligations when administering the OTA. It was also of the view that section 7AA did not give effect to true

[56] Waitangi Tribunal. (2021). He Pāharakeke, he Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry.
[57] Articles 3 and 4.
[58] Waitangi Tribunal. (2021). He Pāharakeke, he Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry.
[59] Section 4(1)(f).

partnership, as required by te Tiriti, and continued to perpetuate the "master-servant dynamic" between the Crown and Māori.[60]

The OTA also recognises the rights of tamariki Māori under the CRC and the Indigenous Declaration in subsection 5(b)(i), which provides that the courts and Oranga Tamariki must respect and uphold, "the child's or young person's rights (including those rights set out in UNCROC and the United Nations Convention on the Rights of Persons with Disabilities)". The way this section is drafted makes it clear that the courts and Oranga Tamariki must respect and uphold all children's and young people's rights including, but not limited to, their rights set out in the UNCROC (i.e. the CRC) and the Convention on the Rights of Persons with Disabilities, as well as their rights set out in other rights instruments, like te Tiriti and the Indigenous Declaration.

As noted by Judge Fitzgerald in *LV*, "[f]or young Māori in particular, the new provisions of the Act provide very strong obligations on all of us to change current practice. They also provide very important, powerful tools, such as the CRC and the Treaty of Waitangi, that are capable of being used to achieve much improved outcomes."[61] While a distinct change in current practice is yet to be observed, the Family Court is starting to respect and uphold these rights when it weighs te ao Māori principles and makes determinations about what is in the best interests of tamariki Māori. In some cases, the Court has refused to make orders because it has found these rights have been breached and that Oranga Tamariki has failed to discharge its related obligations: [62]

> *The consequences of what has happened here, in relation to the breaches of the Act's provisions, breaches of [L]'s rights under the CRC, and the breaches of Treaty principles and duties, are relevant to the decisions I have made today. That is not least of all because if there had been full and proper compliance with the Act, with the CRC, and with the Treaty obligations, [L] would not be in this position.*[63]

As required by the OTA and acknowledged by Judge Fitzgerald, a widespread change in practice across the Family Court is still needed, such that the rights of tamariki Māori under te Tiriti, the Indigenous Declaration and the CRC are respected and upheld every time it is asked to make a best interest determination in relation to tamariki Māori. These rights give considerable weight to te ao Māori principles under the Act and when taken into account should resolve any doubts the Court holds around what priority they should be given when considering what is in the best interests of tamariki. As guaranteed by te Tiriti, the Indigenous Declaration and the CRC, tamariki Māori have the right to be raised by their family and within their culture and every effort must be made by the Courts to protect this right.

6. LEARNING FROM INTERNATIONAL APPROACHES

The inadequacies in New Zealand's legislation, as it relates to determining the best interests of tamariki Māori, becomes more evident when compared to the frameworks in place in Australia, Canada and the United States of America (USA). All three jurisdictions have introduced laws or policies to address the disproportionate removal of Indigenous children into State care or to non-Indigenous caregivers and ensure that, wherever possible, they are raised by their families and within their culture. The laws in Canada and the USA also recognise and provide for Indigenous authority over child welfare. While the

[60] Waitangi Tribunal. (2021). He Pāharakeke, he Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry.
[61] *New Zealand Police/Oranga Tamariki v LV* [2020] NZYC 117 at 115.
[62] *New Zealand Police/Oranga Tamariki v LV* [2020] NZYC 117; *New Zealand Police v JV* [2021] NZYC 248.
[63] *New Zealand Police/Oranga Tamariki v LV* [2020] NZYC 117 at 85 and 86.

laws in these countries are not without implementation challenges,[64] their approaches to Indigenous child welfare provide food for thought for improving Aotearoa New Zealand's framework.

6.1 USA

The USA enacted the Indian Child Welfare Act (ICWA)[65] in 1978 in response to the disproportionate removal of Indian children from their families. The ICWA is often referred to as being the "golden standard"[66] in Indigenous child welfare legislation and a "sample statute".[67] It is also strongly supported by the Indian community in the USA.[68]

The ICWA was "designed to direct and guide certain decision-making activities that occur during Indian child custody proceedings in a state court in order to protect the relationship between the Indian child and Indian family, and preserve a tribe's effective exercise of its pre-existing inherent tribal authority."[69]

Key provisions of the ICWA that seek to assist Indian parents to maintain parental rights and prevent child removal include:[70]

- it recognises the exclusive jurisdiction of Indian tribes to determine the best interests of Indian children;
- it provides procedures for identifying an Indian child early on in child welfare proceedings and notifying the child's parents and Tribal Nation;
- it provides for cases to be transferred to tribal court adjudication at the parents' or tribe's request. When this is not possible, the ICWA provides for Tribal Nation involvement in the court proceeding;
- it requires child welfare agencies to make "active efforts" to help families make changes to either keep a child safely in their home or enable the child to safely return and reunify with their family (for example, by providing early intervention supports, facilitating access to services, and enaging the child's tribe early to provide assistance). Child welfare agencies are also required under the ICWA to demonstrate to the courts that active efforts were taken prior to seeking orders to remove a child or place them into out-of-home care. [71]
- it requires that a child may not be removed without the testimony of a qualified expert witness, except in emergencies (narrowly defined as when a child is in danger of imminent harm). While the ICWA does not elaborate on who qualifies as an expert witness, its guidelines indicates a preference for experts from the child's tribe or with substantial knowledge and experience in Indian child welfare practices

[64] For more information relating to implementation challenges and the USA, see https://www.un.org/esa/socdev/unpfii/documents/The%20Indian%20Child%20Welfare%20Act.v3.pdf; Canada, see https://yellowheadinstitute.org/wp-content/uploads/2019/07/the-promise-and-pitfalls-of-c-92-report.pdf; and, Australia, see https://aifs.gov.au/resources/policy-and-practice-papers/enhancing-implementation-aboriginal-and-torres-strait-islander

[65] See https://www.congress.gov/95/statute/STATUTE-92/STATUTE-92-Pg3069.pdf

[66] See https://www.indian-affairs.org/indian-child-welfare-act.html; Yellowhead Institute. (2019). An Act respecting First Nations, Inuit, and Métis Children, Youth and Families - Does Bill C-92 Make the Grade?

[67] https://www.un.org/esa/socdev/unpfii/documents/The%20Indian%20Child%20Welfare%20Act.v3.pdf

[68] For more information, please see the Association on American Indian Affairs' website: https://www.indian-affairs.org/indian-child-welfare-act.html.

[69] See https://www.indian-affairs.org/indian-child-welfare-act.html

[70] See https://www.childwelfare.gov/pubPDFs/icwa.pdf and https://www.casey.org/icwa-gold-standard/

[71] See https://www.bia.gov/sites/default/files/dup/assets/bia/ois/ois/pdf/idc2-041405.pdf

and culture, with some States explicitly providing for this in their laws or guidelines.[72]
- it mandates that if children are removed from their home, agencies and the courts must prioritise their placement with extended family or within the tribal community to ensure they can remain connected to their culture and identity;
- it provides for funding assistance to be provided to Tribal Nations to establish and operate Indian child and family service programmes and to participate in, or support families involved in, child welfare proceedings; and
- it provides for Tribal Nations and States to enter into agreements on how they will cooperate and collaborate with each other in relation to the care and custody of Indian children and jurisdiction over child custody proceedings. These agreements can establish specific procedures, such as how States will notify Tribal Nations of emergency removal and initial court hearings, what mechanisms will be used for identifying and recruiting appropriate placements for Indian children, and what financial arrangements will be put in place between the Tribe and State regarding the care of children.[73]

6.2 Canada

In 2019, Canada enacted Bill C-92: An Act respecting First Nations, Inuit and Métis children, youth and families (Bill C-92).[74] Bill C-92 was prompted by the residential schools legacy, the outcomes of Canada's Truth and Reconciliation Commission and Canada's Human Rights Tribunal's ruling in the First Nations Caring Society case.[75]

The purposes of Bill C-92 are to:

- recognise Indigenous people's jurisdiction over child and family services, as part of an inherent Aboriginal right to self-governance;
- establish national standards in this area, in response to Canada's Truth and Reconciliation Commission's Call to Action #4; and
- contribute to the implementation of UNDRIP.

Key provisions of Bill C-92 include that it:

- provides specifically for how the best interests of an Indigenous child is to be determined. It affirms that the best interests of the child is the primary consideration but also explicitly states that this includes the importance of the child having an ongoing relationship with his or her family and with the Indigenous group, community or people to which he or she belongs and of preserving the child's connections to his or her culture;[76]
- contains a "consistency" clause, which provides that the best interest provisions should be interpreted in a manner consistent with Indigenous law whenever possible;[77]
- provides standing to the child's family and Indigenous governing body acting on behalf of the Indigenous group to which the child belongs in proceedings and the right to make representations;[78]

[72] See https://narf.org/nill/documents/icwa/faq/expert.html
[73] For further background see: Association on American Indian Affairs (2017). A Survey and Analysis of Tribal-State Indian Child Welfare Act Agreements including Promising Practices.
[74] See https://www.parl.ca/DocumentViewer/en/42-1/bill/C-92/royal-assent
[75] Yellowhead Institute. (2019). An Act respecting First Nations, Inuit, and Métis Children, Youth and Families - Does Bill C-92 Make the Grade?
[76] Subsection 10(2).
[77] Section 10(4).
[78] Section 13.

- prioritises placement with family members and within a child's own community and culture over non-Indigenous placements and recognises the importance of cultivating and maintaining an Indigenous child's attachment and emotional ties to family when not placed with family members;[79]
- requires child and family services to demonstrate they have taken "reasonable efforts" to ensure the child continues to reside with their parents or family members;[80]
- requires ongoing reassessments to determine whether an Indigenous child can return to the care of their family or someone in their own community if they are not currently placed with such a person;[81] and
- provides that, to the extent it is consistent with the best interests of the child, a child should not be removed solely on the basis of his or her socio-economic conditions, including poverty, lack of adequate housing or the state of health of his or her parent or the care provider.[82]

Bill C-92 also affirms that Canada's Indigenous peoples' inherent right of self-government, as recognised and affirmed by section 35 of the Constitution Act 1982, includes jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority.[83] To exercise this jurisdiction, an Indigenous governing body gives notice of its intention to do so and may request to enter into a coordination agreement with government authorities.[84] Bill C-92 also provides that any law made by an Indigenous group in relation to child and family services has the same force as federal law and prevails if there is a conflict or inconsistency with federal law (except for Bill C-92 and the Canadian Human Rights Act).[85]

6.3 Australia

Australia developed the Aboriginal and Torres Strait Islander Child Placement Principle (Child Placement Principle) 30 years ago in response to its history of Aboriginal child removal, known as the Stolen Generations. The Child Placement Principle was inspired by the ICWA and its primary goal is to enhance and preserve Aboriginal and Torres Strait Islander children's connection to family and community, and sense of identity and culture.[86]

The aims of the Child Placement Principle are to:

- recognise and protect the rights of Aboriginal and Torres Strait Islander children, family members and communities in child welfare matters;
- increase the level of self-determination for Aboriginal and Torres Strait Islander people in child welfare matters; and
- reduce the disproportionate representation of Aboriginal and Torres Strait Islander children in the child protection system.[87]

[79] Section 16.
[80] Section 15.1.
[81] Section 16(3).
[82] Section 15.
[83] Section 18.
[84] Section 20.
[85] Sections 21 and 22.
[86] Australian Institute of Family Studies (2015). Enhancing the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle.
[87] Secretariat of National Aboriginal and Islander Child Care (2013). Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements.

From these three general principles, five inter-related elements of the Child Placement Principle flow:[88]

- *Prevention*: Protecting children's rights to grow up in family, community and culture by redressing the causes of child protection intervention.
- *Partnership*: Ensuring the participation of community representatives in service design, delivery and individual case decisions.
- *Placement*: Placing children in out-of-home care in accordance with the placement hierarchy, which provides that Aboriginal and Torres Strait Islander children must be placed with family and wider kin networks first, with non-related Indigenous carers in the child's community second, and non-related Indigenous carers outside their community third. Placement with non-Indigenous carers is a last resort and children must be able to maintain their connections to family, community and cultural identity.
- *Participation*: Ensuring the participation of children, parents and family members in decisions regarding the care and protection of their children.
- *Connection*: Maintaining and supporting connections to family, community, culture and country for children in out-of-home care.

As agreed by Australia's Community Services Ministers, "active efforts" must be implemented to ensure compliance with the five elements in all jurisdictions.[89] The active efforts concept is drawn from the ICWA. The Secretariat for National Aboriginal and Islander Child Care (SNAICC) has developed guidance on what constitutes active efforts across all five elements of the Child Placement Principle and provided examples of promising practices in applying active efforts within family support, child protection and out-of-home care services and systems.[90]

Over time, the Child Placement Principle has been incorporated into the child protection legislation, policies or regulations of all Australian states and territories. A set of indicators has been developed, in partnership with Aboriginal and Torres Strait Islander non-government organisations, to track and measure their progress on implementing the five elements[91] and SNAICC also undertakes annual comprehensive reviews.[92] SNAICC has also developed best practice guidance on how to incorporate the Child Placement Principle in legislation, policy and practice.[93]

These international approaches to Indigenous child welfare highlight some key areas in which Aotearoa New Zealand's child welfare framework could be improved, particularly around the inherent jurisdiction of Māori and authority of Māori to determine what is in the best interests of tamariki Māori. Suggestions for a way forward for Aotearoa New Zealand are considered in the next section.

---

[88] Ibid; Secretariat of National Aboriginal and Islander Child Care (2017). Understanding and Applying the Aboriginal and Torres Strait Islander Child Placement Principle.
[89] Secretariat of National Aboriginal and Islander Child Care (2019). The Aboriginal and Torres Strait Islander Child Placement Principle: A Guide to Support Implementation.
[90] Ibid.
[91] See https://www.aihw.gov.au/reports/child-protection/atsicpp-indicators/contents/about
[92] See https://www.snaicc.org.au/reviewing-implementation-of-the-aboriginal-and-torres-strait-islander-child-placement-principle-2020/
[93] Secretariat of National Aboriginal and Islander Child Care (2017). Understanding and Applying the Aboriginal and Torres Strait Islander Child Placement Principle.

7. A WAY FORWARD

Considering the issues outlined above in relation to Aotearoa New Zealand's current care and protection legislation as it relates to tamariki Māori, the overlaying te Tiriti, Indigenous Declaration and CRC considerations and the more advanced approaches taken in other jurisdictions, it is clear that significant change is required.

First and foremost, Aotearoa New Zealand's care and protection system, including its governing legislation and court processes, needs to be significantly transformed to recognise the authority of Māori to decide what is in the best interests of tamariki Māori and that tamariki Māori should always remain in the care of their whānau, hapū or iwi.

Māori must lead on determining what shape this transformation should take. From this analysis it is clear that some key elements to consider include:

- Recognising the inherent jurisdiction of Māori to determine what is the best interests of tamariki Māori and explicitly reflecting this in Aotearoa New Zealand's care and protection legislation.
- Providing for Māori to lead on all aspects of determining what is in the best interests of tamariki Māori in need of care and protection, from ensuring whakapapa placements are identified through to adjucating legal proceedings and providing support services.
- If it is necessary for the Family Court to adjucate a matter, the legislation needs to be amended to clearly prescribe how the best interests of tamariki Māori are to be determined and what procedures the Court must follow, particularly in relation what standard of evidence must be provided to the Court, what assistance the Court must seek to aid its determination and in what circumstances it will be prevented from making a decision until further information is provided.
- Providing for care and protection proceedings involving tamariki Māori, and Family Group Conferences and other meetings convened by Oranga Tamariki in accordance with the OTA but outside the court system, to be held in accordance with tikanga Māori and te ao Māori.
- Provide effective resourcing and funding to ensure these widespread system changes and associated capacity building are comprehensive, fit-for-purpose and implemented.

Until these changes occur, we encourage:

The Courts to:

- Stipulate that judges:
    - must always seek expert evidence to assist their interpretation of te ao Māori principles in relation to a particular child in the ways provided for in the OTA (e.g. request a cultural or community report, appoint a lay advocate with relevant cultural expertise, seek representations or evidence from whānau, hapū or iwi representatives);
    - require Oranga Tamariki to provide evidence that they have exhaustively investigated whakapapa placements with a child's whānau, hapū and iwi;
    - if Oranga Tamariki fails to identify a whakapapa placement, seek representations or evidence from whānau, hapū or iwi representatives before making final decisions;
    - if in the best interests of tamariki Māori, refuse to make orders until Oranga Tamariki provides care plans that reflect and give practical effect to the OTA's te ao Māori principles and the rights of tamariki Māori under te Tiriti, the Indigenous Declaration and the CRC.

    - consider the rights of tamariki Māori under te Tiriti, the Indigenous Declaration and the CRC, as required by the OTA, when making best interest determinations.
- Provide specific training to all judges on how to adjudicate best interest determinations involving tamariki Māori in line with new requirements of the OTA, including monitoring whether Oranga Tamariki is complying with its obligations under the OTA in its representations to the Court.

The Chief Executive of Oranga Tamariki to:

- As a matter of priority, work with and fund iwi and Māori organisations to design and implement a nationwide whakapapa placement identification system to ensure tamariki Māori in need of care and protection are always placed in whakapapa care.
- Require Oranga Tamariki staff to work with whānau, hapū, iwi and Māori organisations to identify whakapapa placements in all cases involving tamariki Māori.
- Take a proactive and comprehensive approach to developing strategic partnerships with iwi and Māori organisations across Aotearoa New Zealand, and wherever possible, delegate their functions and powers under the OTA to iwi and Māori organisations as provided by section 7AA(2)(c)(iv).
- Ensure that in addition to a child's immediate whānau, representatives from their hapū and iwi are also involved in all aspects of care and protection proceedings, including Family Group Conferences and other meetings convened by Oranga Tamariki in accordance with the OTA outside the court system.
- As required by subsection 5(b)(i) and section 7AA:
    - ensure that all the policies, practices and services clearly articulate that Oranga Tamariki must give effect to te ao Māori principles under the OTA and the rights of tamariki Māori under te Tiriti, the Indigenous Declaration and the CRC;
    - update all guidance and tools to reflect these obligations; and
    - closely monitor that all Oranga Tamariki staff are following these directives in practice.

Whānau, hapū and iwi involved in care and protection proceedings and their legal representatives can:

- Make submissions to the Court that emphasise that the OTA:
    - requires Oranga Tamariki and the Courts to maintain and strengthen the relationship between a Māori child and their kinship group wherever possible; and
    - that this duty is further reinforced by the other provisions of the OTA, which require Oranga Tamariki and the Courts to respect and uphold the rights of tamariki Māori, which includes their right to live with their families and be connected to their culture as guaranteed under te Tiriti, the Indigenous Declaration and the CRC, and give practical effect to te Tiriti, which guarantees the authority of Māori to determine what is in the best interests of tamariki Māori.
- Request that the Court:
    - appoints a lay advocate with relevant cultural expertise to assist the Court;
    - appoints a lawyer with relevant cultural background to represent the child;
    - if expert evidence from a child psychologist is required, seek evidence from a psychologist who is Māori or a psychologist who has requisite knowledge of tikanga Māori and te ao Māori and can provide an expert opinion informed by tikanga Māori and te ao Māori;

    - commissions cultural and/or community report/s; and/or
    - seeks evidence from a child's whānau, wider family group and iwi representatives.

Iwi and Māori organisations can:

- keep applying pressure on the Government to recognise your inherent authority to lead on the care and protection of tamariki Māori.
- request that the Chief Executive of Oranga Tamariki develop an iwi strategic partnership, which delegates authority and powers under the OTA to you, and provides funding to support the execution of these functions.
- design and implement a whakapapa placement identification system, with funding support from Oranga Tamariki, to ensure tamariki Māori in need of care and protection are always placed in whakapapa care.

APPENDIX A – ORANGA TAMARIKI ACT 1989, ss 5 AND 13 PRINCIPLES

Section 5 principles

1. Any court that, or person who, exercises any power under this Act must be guided by the following principles:
    a. a child or young person must be encouraged and assisted, wherever practicable, to participate in and express their views about any proceeding, process, or decision affecting them, and their views should be taken into account:
    b. the well-being of a child or young person must be at the centre of decision making that affects that child or young person, and, in particular,—
        i. the child's or young person's rights (including those rights set out in UNCROC and the United Nations Convention on the Rights of Persons with Disabilities) must be respected and upheld, and the child or young person must be—
        (A) treated with dignity and respect at all times:
        (B) protected from harm:
        ii. the impact of harm on the child or young person and the steps to be taken to enable their recovery should be addressed:
        iii. the child's or young person's need for a safe, stable, and loving home should be addressed:
        iv. mana tamaiti (tamariki) and the child's or young person's well-being should be protected by recognising their whakapapa and the whanaungatanga responsibilities of their family, whānau, hapū, iwi, and family group:
        v. decisions should be made and implemented promptly and in a time frame appropriate to the age and development of the child or young person:
        vi. a holistic approach should be taken that sees the child or young person as a whole person which includes, but is not limited to, the child's or young person's—
        (A) developmental potential; and
        (B) educational and health needs; and
        (C) whakapapa; and
        (D) cultural identity; and
        (E) gender identity; and
        (F) sexual orientation; and
        (G) disability (if any); and
        (H) age:
        vii. endeavours should be made to obtain, to the extent consistent with the age and development of the child or young person, the support of that child or young person for the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:
        viii. decisions about a child or young person with a disability—

(A) should be made having particular regard to the child's or young person's experience of disability and any difficulties or discrimination that may be encountered by the child or young person because of that disability; and

(B) should support the child's or young person's full and effective participation in society:

c. the child's or young person's place within their family, whānau, hapū, iwi, and family group should be recognised, and, in particular, it should be recognised that—
    i. the primary responsibility for caring for and nurturing the well-being and development of the child or young person lies with their family, whānau, hapū, iwi, and family group:
    ii. the effect of any decision on the child's or young person's relationship with their family, whānau, hapū, iwi, and family group and their links to whakapapa should be considered:
    iii. the child's or young person's sense of belonging, whakapapa, and the whanaungatanga responsibilities of their family, whānau, hapū, iwi, and family group should be recognised and respected:
    iv. wherever possible, the relationship between the child or young person and their family, whānau, hapū, iwi, and family group should be maintained and strengthened:
    v. wherever possible, a child's or young person's family, whānau, hapū, iwi, and family group should participate in decisions, and regard should be had to their views:
    vi. endeavours should be made to obtain the support of the parents, guardians, or other persons having the care of the child or young person for the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:
d. the child's or young person's place within their community should be recognised, and, in particular,—
    i. how a decision affects the stability of a child or young person (including the stability of their education and the stability of their connections to community and other contacts), and the impact of disruption on this stability should be considered:
    ii. networks of, and supports for, the child or young person and their family, whānau, hapū, iwi, and family group that are in place before the power is to be exercised should be acknowledged and, where practicable, utilised.

Section 13 principles

1. Every court or person exercising powers conferred by or under this Part, Part 3 or 3A, or sections 341 to 350, must adopt, as the first and paramount consideration, the well-being and best interests of the relevant child or young person (as required by section 4A(1)).
2. In determining the well-being and best interests of the child or young person, the court or person must be guided by, in addition to the principles in section 5, the following principles:

a. it is desirable to provide early support and services to—
    i. improve the safety and well-being of a child or young person at risk of harm:
    ii. reduce the risk of future harm to that child or young person, including the risk of offending or reoffending:
    iii. reduce the risk that a parent may be unable or unwilling to care for the child or young person:
b. as a consequence of applying the principle in paragraph (a), any support or services provided under this Act in relation to the child or young person—
    i. should strengthen and support the child's or young person's family, whānau, hapū, iwi, and family group to enable them to—
    (A) care for the child or young person or any other or future child or young person of that family or whānau; and
    (B) nurture the well-being and development of that child or young person; and
    (C) reduce the likelihood of future harm to that child or young person or offending or reoffending by them:
    ii. should recognise and promote mana tamaiti (tamariki) and the whakapapa of the child or young person and relevant whanaungatanga rights and responsibilities of their family, whānau, hapū, iwi, and family group:
    iii. should, wherever possible, be undertaken on a consensual basis and in collaboration with those involved, including the child or young person:
c. if a child or young person is considered to be in need of care or protection on the ground specified in section 14(1)(e), the principle in section 208(2)(g):
d. a power under this Part that can be exercised without the consent of the persons concerned is to be exercised only to the extent necessary to protect a child or young person from harm or likely harm:
e. assistance and support should be provided, unless it is impracticable or unreasonable to do so, to assist families, whānau, hapū, iwi, and family groups where—
    i. there is a risk that a child or young person may be removed from their care; and
    ii. in the other circumstances where the child or young person is, or is likely to be, in need of care and protection (for example, where a family group conference plan provides for assistance to be given to a child or parent to address a behavioural issue that may lead, or has led, to the child's removal from the family):
f. if a child or young person is identified by the department as being at risk of removal from the care of the members of their family, whānau, hapū, iwi, or family group who are the child's or young person's usual caregivers, planning for the child's or young person's long-term stability and continuity of living arrangements should—
    i. commence early; and
    ii. include steps to make an alternative care arrangement for the child or young person, should it be required:

g. a child or young person should be removed from the care of the member or members of the child's or young person's family, whānau, hapū, iwi, or family group who are the child's or young person's usual caregivers only if there is a serious risk of harm to the child or young person:

h. if a child or young person is removed in circumstances described in paragraph (g), the child or young person should, wherever that is possible and consistent with the child's or young person's best interests, be returned to those members of the child's or young person's family, whānau, hapū, iwi, or family group who are the child's or young person's usual caregivers:

i. if a child or young person is removed in circumstances described in paragraph (g), decisions about placement should—

    i. be consistent with the principles set out in sections 4A(1) and 5:

    ii. address the needs of the child or young person:

    iii. be guided by the following:

    (A) preference should be given to placing the child or young person with a member of the child's or young person's wider family, whānau, hapū, iwi, or family group who is able to meet their needs, including for a safe, stable, and loving home:

    (B) it is desirable for a child or young person to live with a family, or if that is not possible, in a family-like setting:

    (C) the importance of mana tamaiti (tamariki), whakapapa, and whanaungatanga should be recognised and promoted:

    (D) where practicable, a child or young person should be placed with the child's or young person's siblings:

    (E) a child or young person should be placed where the child or young person can develop a sense of belonging and attachment:

j. a child or young person who is in the care or custody of the chief executive or a body or an organisation approved under section 396 should receive special protection and assistance designed to—

    i. address their particular needs, including—

    (A) needs for physical and health care; and

    (B) emotional care that contributes to their positive self-regard; and

    (C) identity needs; and

    (D) material needs relating to education, recreation, and general living:

    ii. preserve the child's or young person's connections with the child's or young person's—

    (A) siblings, family, whānau, hapū, iwi, and family group; and

    (B) wider contacts.

    iii. respect and honour, on an ongoing basis, the importance of the child's or young person's whakapapa and the whanaungatanga responsibilities of the child's or young person's family, whānau, hapū, iwi, and family group:

    iv. support the child or young person to achieve their aspirations and developmental potential:

k. if a child or young person is placed with a caregiver under section 362, the chief executive, or, if applicable, a body or an organisation approved under section 396, should support the caregiver in order to enable the provision of the protection and assistance described in paragraph (j).