Submission by Ināia Tonu Nei on the review of adoption laws

Tīmatanga Kōrero – Introduction

In response to the lack of intentional spaces to discuss justice reform, Māori called for a Hui Māori to ensure their voices would be heard. Those voices made an urgent call to action for the Crown:

1. *Immediately start to decolonise the justice system, to provide instant relief to processes that continue to harm Māori; and*
2. *Immediately start designing an intergenerational plan to reform the justice system. This includes starting work in areas such as constitutional reform, to ensure the reform of the justice system is enduring and reflects the commitment that the Crown made when signing Te Tiriti o Waitangi.*

Ināia Tonu Nei was formed to represent this call to action under a Mana Ōrite model of partnership with the Crown, beginning with a number of recommendations for justice and constitutional reform reflecting the raw kōrero given at Hui Māori.[1]

It is on this basis that Ināia Tonu Nei makes this submission on adoption law in Aotearoa. By its very definition, adoption is completely at odds with Māori values, worldviews, and child-raising practices.[2] It has demonstrably traumatic, lasting, inter-generational effects on Māori, and it does not reflect the promises of Te Tiriti o Waitangi. A better system for the care and protection of our tamariki is needed.

Ināia tonu nei – now is the time.

Kupu whakataki – A note on this submission

In preparing this submission, we have drawn on the mātauranga and experience of tohunga studying or working in the field of adoption, which has shown us the depth of research already undertaken on adoption in Aotearoa and its effects on adoptees. We have therefore chosen not to replicate the extensive analysis of issues with adoption in Aotearoa that they have already undertaken. Instead, we wish to elevate their voices by deferring the Crown to them.

A full list of references we have relied on is supplied at the end of this submission, but the following tohunga and their works that have heavily informed our proposals, which we encourage the Crown to engage with directly, are:

- *Ka Tū te Whare, Ka Ora: The Constructed and Constructive Identities of the Māori Adoptee* – Dr Annabel Ahuriri-Driscoll (Ngāti Porou, Rangitāne, Ngāti Kahungunu, Ngāti Kauwhata)
- *Practice of adoption in Aotearoa before the 1881 Adoption of Children Act* – Dr Erica Newman (Māori descent, iwi unknown)
- *Belonging and Whakapapa: The Closed Stranger Adoption of Māori Children into Pākehā Families* – Maria Haenga Collins (Ngāti Porou, Te Aitanga-a-Mahaki, Ngāi Tahu)

[1] More information about Ināia Tonu Nei, the call to action, and recommendations for justice reform can be found on our website: https://www.inaiatonunei.nz/

[2] According to the Adoption Act 1955, the adopted child is deemed to "become the child of an adoptive parent… as if the child had been born to that parent in lawful wedlock."

For the purposes of this submission, we summarise the key issues with adoption in Aotearoa as explored in depth by these tohunga to be:

- Severing of whakapapa and whānau connection
- Prioritising of mātua over tamariki
- Prioritising of individuals over collectives
- Traumatising of adoptees

The proposals in this submission aim to address these broad expressions of the many, complex issues with adoption in Aotearoa. They also provide for the honouring of Te Tiriti o Waitangi, which, for reasons discussed in this submission, the current system of adoption does not do. For the avoidance of doubt, our focus is on better outcomes for tamariki and whānau Māori, however we believe our proposals will benefit all children in Aotearoa.

While adoption is not a universally traumatic experience, for many adoptees it has been. We feel obligated to state that adoption reform cannot take place without acknowledging the real, lasting harm that adoption has caused. Again, we leave that kōrero to the people who have experienced it firsthand. But we record here our aroha for them, and our tautoko for their right to be heard by the Crown.

Ngā whanonga pono – Māori values for childcare

We frame this submission by a set of values that underpin traditional Māori childcare practices and social structures:

TAPU

WHAKAPAPA

WHĀNAU

AROHA

Understanding these values is crucial to the proposals made in this submission. However, we stress that there is an inherent limitation of defining them in English. The explanations below should not be taken as definitive, but an approximation drawn from multiple reliable sources.

TAPU	Perhaps the most difficult of these values to define, translations often refer to spiritual or religious restriction.[3] Simple translations can include "holy" or "sacred".[4] For the purposes of this submission, we define tapu as spiritual power inherited by the atua (personifications of the natural forces of reality). It is present in, and intrinsic to, all things.[5] The notions of restriction in relation to tapu arise from the need to protect that tapu,[6] or rather, protect people from the effects of it being broken. In simple terms, tapu can be thought of as intrinsic value, qualities, and attributes.
WHAKAPAPA	Commonly translated as "genealogy", the word itself is derived from "whakapaparanga", which means a layer or series of layers.[7] Whakapapa can also be thought of as a verb, rather than a noun; breaking the kupu down into components results in the prefix "whaka", meaning to cause to happen or become, and "papa", referring to a base, foundation or layer. Taken together as a compound word, "whakapapa" can refer to a layering of one thing upon another, or of becoming earth.[8] These expressions inform our definition of whakapapa as biological and genealogical connection informing holistic identity.
WHĀNAU	In its simplest terms, whānau can be translated as the basic nuclear family unit. However, we consider the "nuclear family" to be largely a Pākehā construct; traditionally, whānau Māori could consist of three generations, from grandchildren, to parents and their siblings, to grandparents, numbering as many as ninety.[9] We therefore define whānau as a close collective of individuals linked by shared whakapapa.
AROHA	Universally understood as "love". We define it as love at its most generous and selfless realisation, encapsulating compassion, empathy, sympathy, and good will.

[3] *Dictionary of the Māori Language* (Seventh Edition), H.W. Williams M.A, 1971.
[4] Ibid.
[5] *Tikanga Māori: Living by Māori values*, Hirini Moko Mead, 2013.
[6] *Te Tangata: The Human Person*, Michael P. Shirres, 1997. Referenced in *Tikanga Māori: Living by Māori values*, Hirini Moko Mead, 2013.
[7] "The Terminology of Whakapapa", *Journal of the Polynesian Society*, Apirana Ngata and Wayne Ngata, 2019. Referenced in *Ka Tū te Whare, Ka Ora: The Constructed and Constructive Identities of the Māori Adoptee*, Annabel Ahuriri-Driscoll, 2020.
[8] "The Enowning of Thought and Whakapapa: Heidegger's Fourfold", *Review of Contemporary Philosophy*, Carl Mika, 2014. Referenced in *Ka Tū te Whare, Ka Ora: The Constructed and Constructive Identities of the Māori Adoptee*, Annabel Ahuriri-Driscoll, 2020.
[9] *Tikanga Māori: Living by Māori values*, Hirini Moko Mead, 2013.

It is important to understand these concepts as we have defined them in context. For this purpose, we now explore the Māori cosmogony from which these values are derived. Much of the following is inspired by *Traditional Maori Parenting: An Historical Review of Literature of Traditional Maori Child Rearing Practices in Pre-European Times*, published by Te Kāhui Mana Ririki in 2011, which we recommend for further reading by the Crown.

I te timatanga – In the beginning

As with any indigenous oral history, there are countless variations to the Māori creation narratives. What follows is a simplified account based on some of the most commonly-known aspects.

> In the beginning, Papatūānuku the Earth Mother and Ranginui the Sky Father lay together in eternal embrace. They had many tamariki who lived in the dark, narrow space between them. The atua – their tamariki – eventually desired freedom from the darkness and suppression of their parents' embrace. They decided to separate Papa and Rangi, which Tāne-mahuta succeeded in doing. Their separation brought the atua into te Ao Mārama – the world of light and knowledge – allowing them to flourish and populate the world.
>
> Tāne would go on to create the first woman, Hine-ahu-one, who he shaped out of earth and breathed life into. From their union came Hine-tītama, who Tāne eventually took as his wife. From this union, human beings were born. Upon learning that Tāne is her father, Hine-tītama departed to Rarohenga, the underworld deep within Papatūānuku, where she became Hine-nui-te-pō.

Within this simplified narrative, the four values that underpin this submission can be found.

Papa and Rangi, as the fundamental realms of earth and sky respectively, are supremely **tapu**. That tapu – or power – is beyond our control or true comprehension, and is a defining aspect of Papa's and Rangi's identity.

The children of Papa and Rangi, the atua who represent the natural forces of our world, inherit that tapu through their **whakapapa**. It is the source of their power, identity, and ability to shape the world around them. Known as the ira atua, or divine essence, it is also passed down by them through whakapapa to the various flora and fauna that are their offspring. This includes humans, who were born from the union of Tāne and Hine-tītama.

Together, these atua, their parents, and their offspring, are all **whānau**, linked by whakapapa. Despite the separation of Rangi from his wife and tamariki, this act did not sever the relationship between them all as whānau, nor the connection they share through whakapapa.

One might question how the separation of Papa and Rangi by their tamariki demonstrates **aroha**. After all, it was out of love for his parents that the brother of Tāne, Tāwhiri-mātea, opposed their separation. Tāne was successful in separating them not due to an absence of aroha, but in spite of it. After the separation, he still demonstrated aroha for his parents by growing forests to clothe Papa, and adorning the chest of Rangi with stars. Papa and Rangi also continued to show aroha for their tamariki by assisting them in various ways and providing them with guidance.

These narratives also teach us about inappropriate behaviour within a whānau. Rangi and Papa neglected their tamariki by smothering them and preventing their growth. The separation was a necessary act committed in the best interests of the tamariki above all else.

When Hine-tītama learned that Tāne was her father and departed to Rarohenga, she established that incest between whānau members was unnatural and wrong. It also demonstrated the importance of whakapapa connection; when Hine-tītama fled, it was into the care of her grandmother, Papa.

Expression of these values in traditional Māori society

These values, and the narratives they are derived from, informed traditional Māori socialisation. Māori were not a homogenous people and tikanga differed between groups, however, there were common practices and understandings between them. What follows is a broad description only of those practices as they relate to tamariki, noting that they may have differed slightly between iwi, hapū, and whānau. Again, we acknowledge Te Kāhui Mana Ririki for informing much of the following kōrero.[10]

A fundamental principle for raising tamariki was the belief that they were taonga from the atua and tūpuna, preceding those who were unborn. This made them tapu, in the sense that mistreating tamariki would offend the atua and tūpuna who had gone before.

The tapu nature of tamariki was evident in the many rituals and practices surrounding their birth and care. Newborn babies would be the subject of karakia, waiata, and pao in a series of rites that bound them to the whānau and the whānau to them. Waiata oriori, or lullabies, would reinforce the whakapapa and tapu of the child, composed to build them up as a useful member of the whānau and hapū.

The child's place in the whānau and hapū is an important point. All members of these collectives shared whakapapa, and therefore all adults who belonged to them had a responsibility to care for tamariki. This community care for tamariki was observed by early Pākehā settlers to be largely absent of physical punishment, instead focussed on education based on aroha. Tamariki were valued, nurtured, and included in all the affairs conducted by their elders. In this way, everything tamariki saw and did prepared them for adulthood, where they would become warriors, food producers, and child carers themselves.

The traditional practice of whāngai is a specific example of how these values were practised by Māori. Dr Erica Newman defines whāngai as "the Māori kinship method of child circulation where a child may move, or be moved, from one familial household to another for a specific reason, sometimes temporary and sometimes permanently."[11] Whāngai literally means "to feed",[12] but in the context of raising a child, the practice of whāngai was "focussed not only upon food but also upon nurturing, educating, providing opportunities to grow up as a healthy individual with one's mauri strong, one's mana secure, and one's tapu intact."[13] We understand the practice of atawhai to be similar to whāngai, except that the child is moved to a household they do not have a familial connection to.

There were a number of reasons why a child would become whāngai. They could include the death of one or both parents, to help relatives struggling to conceive, or issues in the home such as illness of parents.[14] Fundamentally, however, the essence of whāngai was to focus on the welfare of the child and the community at large.[15] In other words, it was an act of aroha. Importantly, the child retained their identity and knowledge of their whakapapa, and the arrangement was never presumed to be permanent or to sever the relationship between child and biological parent. As a kinship practice demonstrating the values of tapu, whakapapa, whānau, and aroha, whāngai was not a disadvantage to the child, parents, relatives or community.[16]

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[10] *Traditional Maori Parenting: An Historical Review of Literature of Traditional Maori Child Rearing Practices in Pre-European Times*, Te Kāhui Mana Ririki, 2011.
[11] *Practice of adoption in Aotearoa before the 1881 Adoption of Children Act,* Erica Newman, 2020.
[12] *Dictionary of the Māori Language* (Seventh Edition), H.W. Williams M.A, 1971.
[13] "Tamaiti whāngai: The adopted child", *Landmarks, bridges and visions*, 1997, S. M. Mead. Quoted in *Practice of adoption in Aotearoa before the 1881 Adoption of Children Act,* Erica Newman, 2020.
[14] *Practice of adoption in Aotearoa before the 1881 Adoption of Children Act,* Erica Newman, 2020.
[15] Ibid.
[16] Ibid.

What does Te Tiriti o Waitangi have to do with this?

The promises of Te Tiriti o Waitangi can be summarised as follows:[17]

Article 1 granted the Crown kāwanatanga

Article 2 guaranteed that Māori retain tino rangatiratanga

Article 3 extended to Māori all the rights and privileges of British subjects

We define kāwanatanga as the right to govern.[18] It gives the Crown the power to make laws, such as the Adoption Act 1955.

We define rangatiratanga with the same meaning given to it by former Waitangi Tribunal member, Professor Sir Hugh Kawharu, being "unqualified exercise" of chieftainship.[19]

In defining these concepts, we draw on the model described by the Waitangi Tribunal, and articulated by Matike Mai Aotearoa:[20] that kāwanatanga and rangatiratanga exist as two independent, but constitutionally linked, spheres of influence.

Article 3 created a unique link between these two spheres; it essentially made Māori citizens of "New Zealand" in the kāwanatanga sphere while retaining their mana in the rangatiratanga sphere. In practice, however, the application of Article 3 has had the effect of binding Māori by the same laws as non-Māori while simultaneously denying their tino rangatiratanga under Article 2.

In the context of child welfare, one way in which this was perpetrated was the imposition of the adoption regime. This system of childcare was underpinned by different values, for example: that women and children were the property of a man; that children should only be born in wedlock; and that, should adoption be required, a "clean break" between child and birth parents was desirable so the child could integrate into a new family.[21] It also denied the legitimacy of Māori child-raising practices such as whāngai; we discuss this in more detail later.

By forcing Māori to comply with the same adoption laws as Pākehā citizens, the Crown has prevented Māori from practising their own tikanga for childcare and diminished the values of tapu, whakapapa, whānau, and aroha that underpin those tikanga. This is a denial of tino rangatiratanga and therefore a breach of te Tiriti o Waitangi.

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[17] A full transcript of Te Tiriti o Waitangi (the Māori text) and translation can be found on the Waitangi Tribunal website: https://waitangitribunal.govt.nz/treaty-of-waitangi/

[18] *He Whakaputanga me te Tiriti: The Declaration and the Treaty – The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, Waitangi Tribunal, 2014.

[19] *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, ed Michael Belgrave, Merata Kawharu and David Williams, 1989.

[20] *He Whakaaro Here Whakaumu mō Aotearoa*, Matike Mai Aotearoa – the Independent Working Group on Constitutional Transformation, 2016.

[21] *Belonging and Whakapapa: The Closed Stranger Adoption of Māori Children into Pākehā Families*, Maria Haenga Collins, 2011.

Tō mātou tohutohu – Our recommendation

We have explored how the values of tapu, whakapapa, whānau, and aroha are derived from the traditional narratives that shape Māori understanding of the world and our place in it. We have also identified how these values saw real expression in the child-raising practices of pre-colonial Māori societies, for example, through the practice of whāngai.

Adoption does not embody these values. The key issues with adoption identified at the beginning of this submission are evidence of this:

Severing of whakapapa and whānau connection	The legal fiction that adoption creates – that the child is deemed to have been born to another parent – is an obvious undermining of the whakapapa and whānau values. It also compromises the tapu inherited by whakapapa of a child. We consider this act itself to be antithetical to aroha.
Prioritising of mātua over tamariki	Adoption focusses on the needs of parents – both the birth parents in adopting a child out, and the adoptive parents who raise the child "as if their own". This is at the expense of the child who has no agency in the situation. It doesn't honour the tapu of the child.
Prioritising of individuals over collectives	By prioritising the needs of parents over children, adoption also prioritises individual over collective need. This undermines the value of whānau by disregarding the significance of collective relationships and wellbeing.
Traumatising of adoptees	Trauma is a product of the absence of aroha. While adoption is not necessarily a traumatic experience for all adoptees, evidence shows that, for many, it has been.

The Crown's denial of these values through the enforcement of the Adoption Act 1955 is itself a breach of Article 2 of Te Tiriti o Waitangi, which guarantees to Māori their tino rangatiratanga.

We do not consider simply amending the Adoption Act 1955 and other adoption laws will sufficiently address these issues. The adoption system is based upon, and informed by, outdated Pākehā perceptions of family and legitimacy. We consider a complete overhaul is needed.

We therefore recommend that existing adoption and childcare laws be repealed, and replaced by legislation that establishes a new, Tiriti-compliant system for the care and protection of tamariki in Aotearoa.

We recognise that such a course of action will be an enormous undertaking. We make two sets of proposals to support its implementation: Developmental and Immediate Action.

Developmental proposals

These are intended to set the direction of an overhauled care and protection system for tamariki in Aotearoa. They should not be considered as individual, discrete actions but as pou upon which that new system can be built. Each proposal is marked by its relevance to the founding report of Ināia Tonu Nei and the *Adoption in Aotearoa New Zealand* Discussion Document.[22]

1. A care and protection system informed by tikanga

Relevant Ināia Tonu Nei report recommendation:

- *Review all legislation relating to the justice and state sectors and ensure it reflects Te Tiriti o Waitangi. Immediate review of the Sentencing Act 2002, Bail Act 2000, Criminal Procedure Act 2011 and all legislation relating to care and protection.*

Relevant Discussion Document objectives:

- *1 – To modernise and consolidate Aotearoa New Zealand's adoption laws to reflect contemporary adoption processes, meet societal needs and expectations, and promote consistency with principles in child-centred legislation.*
- *3 – To ensure that adoption laws and practice meet our obligations under Te Tiriti o Waitangi and reflect culturally appropriate concepts and principles, in particular, tikanga Māori, where applicable.*

The *Adoption in Aotearoa New Zealand* Discussion Document makes reference to international agreements such as the Children's Convention and Hague Convention, which say that the child's best interests should be the paramount consideration in adoption. We question the need to look internationally when, as we have shown, tikanga Māori has demonstrable values and practices that hold the welfare of the child as paramount. An important distinction, however, is that the Māori focus on the welfare of the child is not only for the child's own benefit, but also for the positive implications of their wellbeing for the collective good.

We are not suggesting that the Crown appropriate tikanga Māori childcare practices. Instead, we propose that any reformed care and protection system for tamariki be informed by the same values that underpin those tikanga. We offer the values used to frame this submission – tapu, whakapapa, whānau, and aroha – as a starting point.

A values-based system is empowering rather than prescriptive. It allows whānau to make their own decisions for the wellbeing of themselves and their tamariki in accordance with those values. This is tino rangatiratanga in action.

There is precedent for this; the Care of Children Act 2004 is intended to promote children's welfare and facilitate their development by helping to ensure appropriate arrangements are in place for their guardianship and care. It is underpinned by principles that must be taken into account when considering the welfare and best interests of a child, for example, when a parenting order is made. We propose that new legislation be underpinned by Māori values in a similar way.

A simple example of practical application of these values could be that, where a child is to be cared for by someone other than their birth parents, the birth parents' names are not replaced on the child's birth certificate – this would be a protection of the whakapapa value, and the child's right to it.

Another example is outlined in the following proposal.

[22] *Adoption in Aotearoa New Zealand*, Ministry of Justice, 2021.

2. Make the purpose of a reformed system "To protect the tapu of a child"

Relevant Ināia Tonu Nei recommendation:

- *Review all legislation relating to the justice and state sectors and ensure it reflects Te Tiriti o Waitangi. Immediate review of the Sentencing Act 2002, Bail Act 2000, Criminal Procedure Act 2011 and all legislation relating to care and protection.*

Relevant Discussion Document objectives:

- *2 – To ensure that children's rights are at the heart of Aotearoa New Zealand's adoption laws and practice, and that children's rights, best interests and welfare are safeguarded and promoted throughout the adoption process, including the right to identity and access to information.*
- *3 – To ensure that adoption laws and practice meet our obligations under Te Tiriti o Waitangi and reflect culturally appropriate concepts and principles, in particular, tikanga Māori, where applicable.*

As pointed out in the *Adoption in Aotearoa New Zealand* Discussion Document, the Adoption Act 1955 doesn't define the purpose of adoption or when it should be used. The Discussion Document asks for suggestions for the purpose of adoption, and lists a number of options. We consider it critical that any care and protection system for tamariki has a clearly-defined purpose. Being clear on what the system is intended to achieve will inform how it should work.

We propose that the purpose of a reformed care and protection system for tamariki in Aotearoa should be: **To protect the tapu of a child**. This is not only a means of achieving Proposal 1 by drawing on tikanga to inform the system, but also of preserving the hauora of a child in the strongest possible terms.

We have previously defined and contextualised the concept of tapu. Here we discuss tapu as it applies specifically to tamariki.

What do we mean by "the tapu of a child"?

It is a universal understanding that every human being is born with certain rights. Sir Hirini Moko Mead articulates this notion for Māori as birthright,[23] encapsulating all the attributes inherited by a child and the expectations of them by the society they are born into. This includes tapu, which, as we have described, is intrinsic to all things – including individual people. Mead describes one's personal tapu as "a powerful concept when applied to the individual person", because it "reflects the state of the whole person".[24] Tapu represents the very nature of human life, an expression of Māori beliefs about the cosmos and the place of human beings within it.[25] Therefore, failure to care for a person's tapu is to deny them the basic birthright of acceptance and respect, both as an individual and as part of a collective.

As demonstrated by the pre-colonial childcare practices of Māori, this tapu in children is of supreme significance. The many rites surrounding the birth of children, and the oriori sung for them, reinforce the tapu of children and their special place in the collective. Children who were properly cared for, and whose tapu was respected, would flourish and demonstrate the attributes required to contribute meaningfully to the collective.

[23] *Tikanga Māori: Living by Māori values*, Hirini Moko Mead, 2013.
[24] Ibid.
[25] Ibid.

Adoption does not protect the tapu of a child. As previously discussed, tapu is inherited through whakapapa. It is central to a person's sense of identity and belonging. The legal fiction created through adoption severs this connection to whakapapa and identity, thereby compromising a person's tapu. As the experiences of adoptees tell us, the effects of this can be traumatic and enduring. However, these experiences also show that adoption has facilitated more overt attacks on the tapu of children, through physical and sexual abuse. In failing to protect the tapu of a child, adoption has failed to protect their physical, social, psychological, and spiritual well-being too.

How is the tapu of a child protected?

The answer to this question is found in the other values that inform this submission. Recognising that tapu is inherited through whakapapa, which is shared by whānau, implies that the best environment to care for a child's tapu is one in which they have access to their birthright; in other words, they know who they are, how they connect to others and the world around them, and are cared for in a holistic way that enables self-actualisation. Providing this for a child is fundamentally an act of aroha.

In the first instance, we believe that the child's whānau will always be the best providers for this type of care. We accept, however, that this may not always be possible. Decisions about what is best for protecting a child's tapu will depend on the specific circumstances of the child and their whānau, and – for tamariki Māori – should involve their hapū and iwi if known.

In this way, the reformed care and protection system we propose would be much broader than just a different way of facilitating adoption. It requires, for example, support for whānau before and after birth and greater access to wraparound services. We also propose that such a system provide for tamariki to have a say in their own care and protection. Under the current adoption system, the voice of tamariki is silenced.

3. Legally recognise whāngai and atawhai

Relevant Ināia Tonu Nei report recommendations:

- *Review all legislation relating to the justice and state sectors and ensure it reflects Te Tiriti o Waitangi. Immediate review of the Sentencing Act 2002, Bail Act 2000, Criminal Procedure Act 2011 and all legislation relating to care and protection.*
- *Devolve services from Oranga Tamariki to whānau, hapū and iwi to provide care and protection services with and for whānau in their own communities*

Relevant Discussion Document objective:

- *3 – To ensure that adoption laws and practice meet our obligations under Te Tiriti o Waitangi and reflect culturally appropriate concepts and principles, in particular, tikanga Māori, where applicable.*

We have explained the practice of whāngai and atawhai at page 5, and demonstrated how it embodies the four values of tapu, whakapapa, whānau, and aroha. This tikanga, which has existed for hundreds of years, is still widely practised by Māori today.

The *Adoption in Aotearoa New Zealand* Discussion Document correctly states that whāngai and atawhai have no legal recognition. What it fails to do is point out the destructive effect of the Adoption Act 1955 on the exercising of tino rangatiratanga through whāngai and atawhai (which it defines as "adoption in accordance with Maori custom"). Section 19(1) states:

> *No person shall hereafter be capable or be deemed at any time since the commencement of the Native Land Act 1909 to have been capable of adopting any child in accordance with Maori custom, and, except as provided in subsection (2), no adoption in accordance with Maori custom shall be of any force or effect, whether in respect of intestate succession to Maori land or otherwise.*[26]

Not only does this clause refuse to recognise the legitimacy of any whāngai or atawhai arrangement made since 1909, but it determines, in law, that no Māori person is even capable of practising their own tikanga. This is a grossly offensive breach of Article 2 of Te Tiriti o Waitangi.

Aside from the constitutional effect of this legislation, it also has significant practical implications for Māori. Whāngai and atawhai are still widely practised, despite not being legally recognised, in much the same way that they were traditionally; the arrangement is not usually presumed to be permanent and the child typically retains knowledge of and connection with their biological parents. Without legal recognition, however, whāngai and atawhai parents can encounter difficulty accessing government, educational, or medical assistance for the tamariki in their care. This is a breach of Article 3 of Te Tiriti o Waitangi, which guarantees the same rights and privileges of British subjects to Māori; in this case, the basic right of participation in society.

We therefore propose that, along with the repealing of the Adoption Act 1955, whāngai and atawhai be legally recognised in the reformed care and protection system. This will not only address the denial of tino rangatiratanga inflicted by the Adoption Act 1955, but remove the legal barriers that mātua whāngai face in caring for tamariki.

There is precedent for legal recognition of whāngai. Te Ture Whenua Māori Act 1993 defines whāngai as "a person adopted in accordance with tikanga Māori".[27] However, it also gives the Court the power to determine whether a person is whāngai and the nature of their relationship with certain parents for the purpose of land succession. In other words, the legal legitimacy of whāngai in this context is decided by the Courts, not by Māori.

The legal recognition we propose, in the context of care and protection, would not be a "legitimising" of whāngai and atawhai practises. Māori legitimise these practices by exercising them. Legal recognition would simply be the way in which kāwanatanga acknowledges the existing legitimacy of this tikanga, and provides for its expression within the Western legal system. It may be that whānau, hapū, and iwi decide for themselves on a whāngai arrangement, and simply approach a Court for a new type of order that gives the legal recognition needed. We consider, however, that this is a conversation best held widely with Māori to ensure it is implemented appropriately.

[26] https://www.legislation.govt.nz/act/public/1955/0093/latest/DLM293306.html
[27] https://www.legislation.govt.nz/act/public/1993/0004/latest/DLM289882.html

4. Change the role of the Family Court and Oranga Tamariki

Relevant Ināia Tonu Nei report recommendations:

- *Devolve services from Oranga Tamariki to whānau, hapū and iwi to provide care and protection services with and for whānau in their own communities.*
- *Reform the Family Court, with the first step being to establish a tikanga Māori pilot for the Family Court.*

Relevant Discussion Document objectives:

- *1 – To modernise and consolidate Aotearoa New Zealand's adoption laws to reflect contemporary adoption processes, meet societal needs and expectations, and promote consistency with principles in child-centred legislation.*
- *2 – To ensure that children's rights are at the heart of Aotearoa New Zealand's adoption laws and practice, and that children's rights, best interests and welfare are safeguarded and promoted throughout the adoption process, including the right to identity and access to information.*
- *3 – To ensure that adoption laws and practice meet our obligations under Te Tiriti o Waitangi and reflect culturally appropriate concepts and principles, in particular, tikanga Māori, where applicable.*

The Family Court and Oranga Tamariki play critical roles in the current adoption system. The Family Court has the power to grant adoption orders, while Oranga Tamariki largely facilitates the adoption process.

We heard at Hui Māori that Oranga Tamariki is failing Māori and trampling on the mana of children. We also heard that the Family Court is not a safe place for Māori. This is echoed in several reports:[28]

- *Puao-te-ata-tu: the report of the Ministerial Advisory Committee on a Maori perspective for the Department of Social Welfare* (1988) – Recommendation 4 proposed amendments to social welfare legislation. This included changes to the Children and Young Persons Act 1974, which were focussed on retaining a Māori child within their hapū, greater involvement of whānau, hapū, and iwi in Court processes, and improving the Court's understanding and accommodation of tikanga Māori.
- *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (2019) – This identified a range of deficiencies in the recognition of te ao Māori in the Family Court, along with a number of recommendations to address them, including mana whenua involvement in the Court and growing judges' cultural capability.
- *Te Taniwha i te Ao Ture-ā-Whānau: Whānau Experience of Care and Protection in the Family Court* (2020) – This recorded the voices of Māori who have experienced the Family Court. Common issues included the Court's lack of an empathetic, whānau-centred, tikanga Māori approach to proceedings, inconsistency between courts and judges, and the silencing of Māori voices.

We endorse the recommendations made by these reports, which reflect an absence of the values of tapu, whakapapa, whānau, and aroha from the Court and its staff.

[28] We attach copies of the relevant recommendations from each of these reports at **Tāpiritanga 1**.

We consider, however, that true reformation based on these values will require a new forum in which decisions about protecting the tapu of tamariki are made. This might be a Court that includes mana whenua representation, with proceedings held in accordance with their tikanga. We also consider that, in accordance with Proposal 1, whānau, hapū and iwi must be empowered to provide their own care and protection for tamariki in accordance with tikanga Māori values. This requires devolution of Oranga Tamariki services and resources to Māori providers.

Immediate Action proposals

The following are immediate, practical actions the Crown can take to begin the development of a reformed care and protection system for tamariki in Aotearoa.

5. Engage directly with adoptees and their whānau, hapū, and iwi

As stated at the beginning of this submission, research into the lived experiences of adoptees has heavily informed our proposals. While we can provide direction to the Crown from a Tiriti-based, kaupapa Māori perspective, it is not a substitute for the voices of those who have been personally traumatised by adoption. We consider it vital that the Crown provide space for their voices to directly inform the development of a reformed care and protection system for tamariki.

6. Initiate proceedings to acknowledge and apologise to adoptees

We reiterate that, before moving forward with a reformed care and protection system, the effects of the current system need urgent addressing. It is not our place to say how the Crown should proceed with this; it is up to those who have experienced the traumatic effects of adoption to decide. But we consider that providing a space for these voices as recommended in the above proposal will also provide the opportunity for the Crown to respond to them. We propose this occur as a matter of urgency.

Kupu whakamutunga – Conclusion

We appreciate the proposals made in this submission are ambitious. Implementing them will require significant work between the Crown and Māori as Treaty partners. We indicate our willingness and interest in working with the Crown in this regard.

As we have highlighted in this submission, there is already an impressive body of work by tohunga researching in the field on the effects of adoption on tamariki and how to address them. We call on the Crown to listen to these voices and work with them to create a care and protection system that treats our tamariki with the aroha they deserve.

We close this submission with a whakataukī that encapsulates our vision for a reformed care and protection system: one based on the values of tapu, whakapapa, whānau, and aroha, that embodies the promises of Te Tiriti o Waitangi, that supports tamariki to know who they are and where they stand.

Tangata akona ki te kāinga, tūngia ki te marae, tau ana
A person taught at home will stand collected on the marae

Tāpiritanga 1: Recommendations for change of the Family Court in other reports

Puao-te-ata-tu: the report of the Ministerial Advisory Committee on a Maori perspective for the Department of Social Welfare

Recommendation 4 (Deficiencies in Law and Practice)

We recommend the following amendments to legislation:

(a) The Social Welfare Act 1971 be amended to provide for the establishment of the Social Welfare Commission.

(b) The Social Security Act 1964 be amended to provide for the following:

(i) Abolition of the Social Security Commission.

(ii) Clarify the law so that there is no impediment to verification of age and marital status being established from Marae or tribal records and that a Maori custom marriage is recognised for the purposes of the Social Security Act.

(iii) Restructuring of the unemployment benefit so that it can provide greater incentive to work, whether part time or full time, training or entrepeneurial initiative and to provide the flexibility through discretion for the Social Welfare Commission to develop variations of or alternatives to the unemployment benefit that are tailored to the needs of the individual.

(iv) Social Security benefit child supplements be made more readily available where the care of Maori children is transferred from natural parents to the grandparents or other relatives.

(v) Eligibility to orphans benefit provisions be extended to include the claims of unsupported children, so that payment can be made to whanau members who are looking after these children.

(c) The Children and Young Persons Act 1974 be reviewed having regard to the following principles:

(i) That in the consideration of the welfare of a Maori child, **regard must be had to the desirability of maintaining the child within the child's hapu;**

(ii) that the whanau/hapu/iwi must be consulted and may be heard in Court of appropriate jurisdiction on the placement of a Maori child;

(iii) that Court officers, social workers, or any other person dealing with a Maori child should be required to make inquiries as the the child's heritage and family links;

(iv) that the process of law must enable the kinds of skills and experience required for dealing with Maori children and young persons hapu members to be demonstrated, understood and constantly applied.

The approach in recommendation (iv) will require appropriate training mechanisms for all people involved with regard to customary cultural preferences and current Maori circumstances and aspirations;

(v) that prior to any sentence or determination of a placement the Court of appropriate jurisdiction should where practicable consult, and be seen to be consulting with, members of the child's hapu or with persons active in tribal affairs with a sound knowledge of the hapu concerned;

(vi) that the child or the child's family should be empowered to select Kai tiaki or members of the hapu with a right to speak for them;

(vii) that authority should be given for the diversion of negative forms of expenditure towards programmes for positive Maori development through tribal authorities; these programmes to be aimed at improving Maori community service to the care of children and the relief of parents under stress.

Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms

Recommendations

5. **Amend** the Care of Children Act 2004 to include a commitment to te Tiriti o Waitangi (the Treaty of Waitangi).
6. Until sufficient Māori judges are appointed to the Family Court, **invite** the Chief District Court Judge to:
   a. appoint some Māori Land Court judges to sit in the Family Court
   b. require all new Family Court judges to spend one week observing Māori Land Court proceedings
   c. require all Family Court judges to attend the tikanga Māori programme delivered by the Institute of Judicial Studies.
7. **Direct** the Ministry of Justice, in partnership with iwi and other Māori, the Court and relevant professionals, to develop, resource and implement a strategic framework to improve family justice services for Māori. The strategic framework and subsequent action plan should include:
   a. appointing specialist advisors to assist the Family Court on tikanga Māori
   b. supporting kaupapa Māori services and whānau-centred approaches
   c. providing a Mana voice to ensure the Family Court has access to mana-whenua and wider Māori community knowledge
   d. developing a tikanga-based pilot for the Family Court
   e. phasing in the presumption that Māori lawyer for child are appointed for tamariki Māori
   f. considering how the Family Court registries can better identify and support mana whenua relationships with the Court
   g. providing adequate funding for culturally appropriate FDR processes.

TOWARDS TRANSFORMATIONAL CHANGE

It is well understood that the trajectory for many tamariki Māori who come to the attention of Oranga Tamariki begins in the Family Court system and ends in the criminal justice system (Hāpaitia te Oranga Tāngata, 2019). What is not so well understood is how we enact change in the Family Court in order to stem this tide.

At an intellectual level, the obligation of the Family Court to uphold the principles of Te Tiriti o Waitangi is also understood. But once again, what is not so well understood is how to give practical effect to this.

The action points arising from this research acknowledge the experiences of whānau Māori while giving increased recognition to the Tiriti partnership. Whānau, hapū and iwi have a significant role to play in stemming the tide of tamariki Māori moving from the Family Court to prison.

The change required to transform the lives of tamariki Māori, whānau, hapū and iwi is largely dependent on the courage and commitment of those with the power to effect change in the system. In this instance, that is the Family Court and the Government.

Transformational change demands more than rhetoric. It demands a commitment that reflects true Tiriti partnership. It also demands courage; courage such as that shown by the Government and Iwi during the Covid-19 pandemic. That is, the courage to make the decisions and take the steps required to ensure the safety of their people.

This report proposes three options for change. While the options are independent, the first two can be implemented together. All, however, require respect, commitment and courage at graduated levels.

1. JUDICIAL AND PROFESSIONAL BEHAVIOUR

Level one focuses on changing the behaviour of the judiciary and professionals involved in the justice system. This option does not require legislative change.

Every court date is an opportunity to engage with whānau, hapu and iwi to support change. Whānau, hapu and iwi must be respected at all points of engagement, and culturally appropriate models of engagement must be understood and enacted by the judiciary. It must be agreed that the attainment of a sound knowledge of tikanga and te reo Māori is non-negotiable for professionals working in the Family Court. Furthermore, respecting mana, whakapapa and whanaungatanga, together with acts of kindness and inclusion towards whānau, are behaviours that should be a common standard for all that work in the Family Court.

2. FAMILY COURT SITTINGS ON SATURDAY

Level two is to hold Family Court care and protection proceedings on a Saturday. This is a practical option, and again does not require legislative change. It does, however, require the commitment and co-operation of the Family Court, the Ministry of Justice and the community.

Having Family Court sessions on a Saturday has the potential to be a simple yet effective way to meet the needs whānau expressed in the survey. The acknowledged barriers that are often raised by members of the judiciary, including time constraints, capacity constraints and whānau availability, would also be alleviated by the option to hold court sittings on a Saturday.

3. TE POARI A NGĀ TAMARIKI, NGĀ TAIOHI ME TE WHĀNAU (CHILDREN, YOUNG PERSONS AND THEIR FAMILIES BOARD)

Level three embraces the partnership envisaged by Te Tiriti. It also requires the greatest level of courage and commitment by Government, Iwi and the community.

We propose the establishment of the Children, Young Persons and Their Families Board. This Board will facilitate care and protection proceedings in place of the Family Court. It will be responsible for applying the law and making the decisions necessary for tamariki who come to the attention of Oranga Tamariki and for whom legal orders are sought. To ensure the Board centres Te Tiriti and tikanga, at least half of the Board members will be Māori.

There is precedent around the world for decision-making in care and protection (child removal) matters to be carried out by a Board. However, the specific provision for the inclusion of indigenous people in the decision-making when legal orders are sought by the state is without precedent. This is an approach that would lend itself to Tiriti partnership, while over time freeing up the Family Court to carry out its remaining core responsibilities.

While there has long been justification for meaningful change in the Family Court, there has been a reluctance to engage beyond superficial tinkering. There has also been a tendency, which must be resisted, to dismiss whānau experience due to the emotional nature of Family Court proceedings. The establishment of a Board will address:

- the issues raised by whānau;
- a real and practical commitment to Te Tiriti o Waitangi;
- ongoing significant operational challenges including delay in the Family Court;
- the adversarial nature of the Family Court;
- the belief of some whānau that the Family Court is the first step in the criminalisation of their tamariki;
- the opportunity to apply an inquisitorial and therapeutic process;
- an approach that sees the Board as part of the solution rather than continued disadvantage;
- the impending number of Family Court Judge retirements and their ongoing cost as judges with acting warrants;
- the considerable cost of appointing new Family Court Judges in their place and
- the lack of community confidence and accountability in the status quo.

Covid-19 has acted as something of a litmus test when considering the decisions made and the ability shown by iwi and the Government to protect people from harm. The establishment of a Board would be a continuation of the rangatiratanga shown at a time when the rest of the world continues to struggle.

That global struggle is intensified by the Black Lives Matter movement, which resonates for Māori, and continues to call for solutions on many fronts. The voices of whānau, the legacy of colonisation and disadvantage, the number of tamariki Māori in state care, together with a prognosis of poor outcomes, echoes that call in the Family Court.

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