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The well-being and best interests of tamariki Māori in the care and protection system: reclaiming culture

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E kore au e ngaro, he kākano i ruia mai i Rangiātea

I will never be lost, for I am a seed of Rangiātea[1]

State intervention in the lives of Māori whānau and the persistent overrepresentation of Māori children and young people in State care have been a significant concern for decades. The Family Court is the key gatekeeper in the State care and protection system and carries substantive responsibility for ensuring the well-being of tamariki Māori. The Court has been seen by many as monocultural and, rather than being protective, has been criticised as compounding the intergenerational cultural dispossession and trauma resulting from colonisation that has contributed to the breakdown of traditional Māori support structures and whānau dysfunction. Recent legislative reforms strengthening the role of tikanga Māori and the rights of cultural identity, belonging and connection in care and protection decision-making are potentially transformative and some recent cases signal a new start, by treating tikanga Māori as central to determining the well-being and best interests of tamariki Māori. Other cases, however, run counter to the new legislative mandate, with the Family Court regarding placement stability and attachment to non-kin caregivers as more significant than cultural identity and belonging. Affirming the mana of Māori children means recognising their connection to their kinship group as a core tenet of well-being: there should be no trade-off between stability and cultural connection, and decisions about where tamariki Māori are to live must be driven by a full understanding of the importance of both. This article highlights the challenges the Court faces to become more informed about tikanga and the rights of tamariki Māori and their whānau, hapū and iwi to cultural identity and belonging, and to explore how to give expression to those values.

Introduction

New Zealand's child care and protection legislation, the Oranga Tamariki Act 1989 (OTA) — reflecting the groundbreaking *Puao-e-Ata-tu* report of the mid-1980s[2] — was considered revolutionary for its time by recognising the role of whānau in decisions about the well-being and best interests of their tamariki and rangatahi (young people). But failure to give effect to the intention of the 1989 legislation led to amendments which came into force in 2019,[3] intended to make the care and protection system more culturally responsive.

The 2019 amendments re-emphasise that cultural values and whānau, hapū and iwi involvement are central to decisions about State intervention in the lives of children and young people and their kinship group. The Act's purposes and principles now refer extensively to tikanga Māori including mana tamaiti, whakapapa and whanaungatanga: these values are fundamental to te ao Māori and now — after decades of State intervention in the lives of tamariki Māori and their whānau — they are explicitly recognised in legislation in the family jurisdiction.

This is a significant shift in the law and requires a new approach. The Family Court, as the specialist tribunal and key decision-maker in care and protection cases, will need a deeper understanding of tikanga Māori and how these values are recognised, respected and given appropriate weight in decisions affecting tamariki Māori in the care and protection system. The renewed challenge for the Family Court will be to apply tikanga in practice, in order to avoid repeating the mistakes of the past. This is particularly acute, given recent criticisms of the Court as monocultural, disempowering and alienating for Māori.[4]

This article examines how the Family Court has responded to the 2019 amendments. Tikanga Māori is now being recognised and actively applied in some cases. But other cases, the so-called "reverse uplift" (or "return to kin care") cases, show that there is a continuing deficit of cultural knowledge and understanding.

It is a given that every child needs and deserves a "safe, stable and loving home", as the Act mandates. But in some cases the Court has placed greater weight on perpetuating placements with non-kin caregivers (placement stability and attachment to caregivers) — based on Western attachment theory, which has been criticised here and in other jurisdictions as monocultural — than on the tikanga of mana tamaiti, whakapapa and whanaungatanga. In these cases, the Court has effectively treated the life-long needs of cultural identity, belonging and connection — *cultural* attachment — for the child and their whānau, hapū and iwi, through a return to kin care, as subordinate to the immediate need for a continuing stable placement.

Clearly, the return to kin care cases, involving vulnerable young children, complex histories and family dysfunction, are among the most difficult the Court faces, but life-long needs of cultural attachment and identity — mana tamaiti, whakapapa and whanaungatanga — cannot be overridden by the immediate need for placement stability in the short-term. Doing so would defeat the clear intent of the 2019 amendments and perpetuate the ongoing, damaging impacts of colonisation. As discussed later in the article, in future cases the Court must explore ways to achieve both a safe, stable, loving home *and* secure cultural attachment for tamariki Māori — understanding that safety and culture are not mutually exclusive.

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Kia whakatōmuri te haere whakamua/looking to the past to inform the future[5]

The need for a renewed focus on cultural values in the care and protection system has a long history. The historical context will be familiar to many readers but the following brief review illustrates some long-standing attitudes that continue to the present day, underscoring the importance of the 2019 legislative reset. The article then examines recent cases that highlight some shortfalls in cultural understanding and the difficult questions that remain to be resolved by the Family Court.

Colonisation and the State care and protection system: the impact on Māori

State care and protection

The stark and enduring disparity in the number of tamariki Māori taken into State care has been the source of much anguish and grievance for Māori, and has for decades been the subject of many reviews and reports.[6] In the Waitangi Tribunal's recent inquiry, the Crown acknowledged that "the broader forces of colonisation and structural racism and the ongoing effect of historical injustices on iwi, hapū, and whānau have been significant contributing factors to the disparity".[7]

The Waitangi Tribunal report makes for grim reading:[8]

> The disparity we examine has arisen and persists in part due to the effects of alienation and dispossession, but also because of a failure by the Crown to honour the guarantee to Māori of the right of cultural continuity embodied in the guarantee of tino rangatiratanga over their kāinga. It is more than just a failure to honour or uphold, it is also a breach born of hostility to the promise itself. Since the 1850s, Crown policy has been dominated by efforts to assimilate Māori to the Pākehā way. This is perhaps the most fundamental and pervasive breach of te Tiriti/the Treaty and its principles. It has also proved to be the most difficult to correct, in part due to assumptions by the Crown about its power and authority, and in part because the disparities and dependencies arising from the breach are rationalised as a basis for ongoing Crown control. To our minds, the disparities are a consequence of the Crown's intrusion into the rangatiratanga of Māori over kāinga.[9]

The Tribunal goes on to say that the:[10]

> continuity of chiefly authority over the village, over the home, is a guarantee of the right to continue to organise and live as Māori. ... it is a guarantee of *the right to cultural continuity*. Fundamental to that is the right to care for and raise the next generation.

The Tribunal report records:[11]

> the pervasive prejudice to generations of Māori arising from the Crown's failure to honour that guarantee [of tino rangatiratanga over their kāinga], and from legislation and policy hostile to it.

The Tribunal concludes that the care and protection system "is a very significant contemporary component" of this history, and that the system has operated to "entrench disparity and serve to further weaken the whanaungatanga bonds that are the foundation of whānau, hapū, and iwi".[12]

The Crown has acknowledged that "structural racism is a feature of the care and protection system which has had adverse effects for tamariki Māori, whānau, hapū and iwi".[13]

The Tribunal concluded that:[14]

> of all the factors that underpin the disparities ..., *none is more enduring and pernicious than the effects of alienation and disconnection from culture*. The primary cause of this disconnection is decades of Crown resistance and hostility to the guarantee to Māori of the right to cultural continuity — embodied in the article 2 guarantee of tino rangatiratanga over kāinga. Poverty and disparities in health, education, and the criminal justice system are all linked to this, and compound the prejudice.

The Tribunal considered that "the essential long-term solution lies in strengthening and restoring whanaungatanga",[15] and that there is a strong case for transformational change — citing the report of the Māori-led inquiry into Oranga Tamariki:[16]

> Decades of reviews, reports and legislation on child welfare services have failed to produce a system that answers the needs of whānau and tamariki. Many of the same themes in this report appear repeatedly throughout the history of State engagement with Māori in the area of child welfare; the desire of Māori communities to keep tamariki with whānau; the lack of responsiveness of services to whānau needs; the continued failure of practitioners to exercise the required cultural intelligence in dealing with whānau. For these reasons, the same mistakes seem to be repeated generation after generation.

In closing, the Tribunal noted that: "Protecting our vulnerable children is both necessary and important. It is an emotive and difficult topic and as the numerous reports and attempts at reform of the child protection system over the last 30 years show, it is difficult to get right."[17]

The importance of getting it right is further underscored by the evidence currently being considered by the Royal Commission of Inquiry into Abuse in State Care, which illustrates the cultural alienation and trauma of Māori children placed in non-kin adoptions or care settings — and that the "impact reverberates from generation to generation":[18]

> "[Māori children in long-term foster care or adopted out] could not find their whānau, hapū and iwi or learn te reo Māori. They also felt disconnected from their culture and struggled to build a sense of identity and belonging. ... Māori communities had little influence over the way Māori children were cared for and little opportunity to provide their own forms of care, whether in child welfare, mental health of disability settings" and "... many Māori felt disconnected from their culture, whakapapa and whenua after being placed in care. They became alienated from their spiritual values, language, culture and identity. Studies of indigenous children in care in Canada and in Australia showed similar outcomes."

The impact of this intergenerational damage perpetuating a cycle of neglect, abuse and trauma on Māori communities is also striking:[19]

> The taking of so many Māori children into care also damages Māori communities, and strikes at the heart of tikanga Māori and Māori autonomy, or tino rangatiratanga. The health and welfare of their future leaders, their rangatahi, is a matter whose importance to Māori cannot be underestimated.

Whānau: the "essential glue" of Māori culture

In the centuries before colonisation, and after, Māori collective relationships — whānau, hapū, and iwi — were the core of te ao

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Māori, underpinned by whanaungatanga or kinship. As Williams J has put it, "The whanau was, and still is, the essential glue that holds Māori culture together".[20] Māori culture has been described as "radically non-individualistic", with "Māori ways of thinking, being and doing ... reliant upon both collectivity and connectedness — our very existence is dependent upon belonging to the corpus or group".[21] Children were cared for in the context of whānau, hapū and iwi:[22]

> The care of children was shared within extended family structures. Children were not considered the property of their parents but belonged to the whanau, which was in turn an integral part of the tribal system bound by reciprocal obligations. Rokx (1998) describes how children, through whakapapa (genealogy) were regarded as the physical embodiment of tuupuna (ancestors), thus giving them a preferential position and ensuring their safety and nurture within whanau and hapu structures. *Within the traditional cultural system whakapapa provides the foundation for identity and self-esteem.*

Despite the impact of colonisation in the second half of the 19th century and into the 20th century, "the whānau persists as an institution in the hearts and minds of Māori people".[23] The turning point — the "great awakening in the law"[24] — came in the 1980s, with the seminal and still widely cited *Puao-te-Ata-tu* report:[25]

> For the first time in an official journal, it told the story of Māori custom and the whānau and the struggle of Māori communities to maintain the relevance of that institution in the face of laws inconsistent with its continued life.

The report became a key driver of the Children, Young Persons, and Their Families Act 1989 (the 1989 Act), which "picked up references in *Puao-te-Ata-tu* emphasising that a Māori child's life needs to be seen within a kin matrix"[26] — provisions that have been considerably strengthened by the 2019 amendments, as will be discussed shortly.

The 1989 Act

Williams J has said of the 1989 Act that:[27]

> What was revolutionary was [the recognition that] the child was not just a child of two parents but a child of an extended family, a village and a tribe. For a country still caught in a natives and settlers paradigm, this was radical.

His Honour, discussing the 1989 Act, noted the apparent tension between the provisions recognising the kinship group's role and the overriding "welfare and interests" of the child[28] — often interpreted as the individual child versus the whānau. But he considered the apparent tension could be resolved by understanding that:[29]

> the best interests of a Māori child will always be, to some extent or other, in attachment to the kin matrix ... [and that] the real challenge for the law is *how* to achieve continued attachment if a whanau is genuinely dysfunctional, not *whether* to do so.

The 1989 Act was intended as a corrective to the many decades of assimilation and institutional racism linked to the over-representation of Māori in State care. But the gap between awareness and practice continued: Western society is based on individualism, the care and protection system is itself Western, and most of the professionals working in the system have traditionally been Pākehā. Whānau empowerment faced major obstacles, including the challenge of working cross-culturally; there has been a tendency to minimise this challenge and "to assume that the central issue (care and protection of children at risk) is the same irrespective of culture".[30]

In the years since, the tragic and disproportionate number of tamariki Māori taken into State care has continued and led, ultimately, to the recent legislative reset. As discussed in the next section, the 2019 amendments hold the promise — after nearly 200 years of colonisation — of a care and protection system that truly recognises the cultural needs of tamariki Māori, whānau, hapū and iwi.

Tikanga Māori in the State care and protection system: a turning point

The 2019 amendments have been described as "the foundation for transformational reform".[31] The amendments were intended to send "a strong signal about the need for culture change and that priority should be given to cultural responsiveness", and to "provide strong guidance about what is expected of those operating under the Act".[32] As noted earlier, those administering the Act, including the judiciary, had not delivered on the intent of the 1989 Act and the 2019 changes were a very clear restatement of Parliament's intent.[33]

A note about parenting disputes and questions of cultural identity

Although the main focus of the discussion that follows is on the Oranga Tamariki Act tikanga provisions in the care and protection system, it should be noted that similar values can also be found in the allied legislation dealing with parental care and guardianship disputes, the Care of Children Act 2004 (CoCA) (although there are some differences).[34] CoCA recognises the importance of kinship relationships, language and cultural identity (s 5(e) and (f)) as principles relating to the child's "welfare and best interests".[35] As the Oranga Tamariki Act caselaw develops, we can expect that jurisprudence on the application of tikanga Māori and cultural values in care and protection cases will influence Care of Children Act decision-making.

The 2019 amendments — tikanga Māori: mana tamaiti, whakapapa and whanaungatanga

The recent amendments to the Act have explicitly reinforced cultural factors as central to decisions about State intervention in the lives of children, young people and their families, whānau, hapū and iwi. The Act's purposes and principles refer extensively to tikanga Māori and cultural considerations: mana tamaiti, whakapapa and whanaungatanga, and the cultural rights of children and their kinship groups, are now integral to decision-making and the exercise of powers under the Act.

The Act's new purposes and principles provide mandatory guidance for care and protection decisions, which must address as the "first and paramount consideration" the well-being and best interests of each child (s 4A).

The new purposes (s 4)

The overriding purposes of the Act (s 4) are to promote the well-being of children and their families, whānau, hapū, iwi, and family groups by:

- ensuring that children have a "safe, stable, and loving home" from the earliest opportunity;
- strengthening their cultural identity, whakapapa and belonging to their kinship group in accordance with tikanga Māori; and

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- recognising the kinship group and their whanaungatanga responsibilities.

Cultural considerations are emphasised throughout s 4, with references to mana tamaiti (s 4(1)(a)(i)), the need for culturally appropriate services (s 4(1)(a)(iii)), assisting the kinship group in preventing harm (s 4(1)(c)) and to meet children's needs (s 4(1)(d)), a practical commitment to te Tiriti o Waitangi 1840 (s 4(1)(f)), the recognition of mana tamaiti, whakapapa and whanaungatanga (s 4(1)(g)), and strengthening children's relationships with their kin group and siblings (s 4(1)(h)).

The introduction of mana tamaiti, whakapapa and whanaungatanga in s 4(1)(a)(i) and s 4(1)(g) is significant. Tikanga Māori, and related values of cultural identity, connection and belonging, are woven through the Act's new purposes and principles. Before discussing their significance to care and protection decision-making, it is important to consider what they mean. The Act provides the following definitions:

- *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 multigenerational kinship relationships that help to describe who the person is in terms of their mātua (parents), and tūpuna (ancestors), from whom they descend"; and
- *whanaungatanga* 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".

There are, of course, complexities not captured in the statutory definitions.[36] Although beyond the scope of this article, it should be noted for instance that:[37]

> ... "whakapapa" is broader than the English concepts of genealogy or lineage. Whakapapa connects a Māori person to the environment and the wider kinship groups of whānau, hapū and iwi ... "When a child is born they are part of a kinship system that has been in place mai rānō (since long ago). Their birth is part of ngā kawai whakapapa (lines of descent and lineage) going back many hundreds of years. Whakapapa is the thing that binds us as people to the past but also ties us to the future and ngā uri whakaheke (those yet to be born).

The new principles (ss 5 and 13)

The tikanga of mana tamaiti, whakapapa and whanaungatanga are explicitly, and repeatedly, incorporated in the Act's general principles (s 5) and the care and protection principles (s 13): see s 5(1)(b)(iv) and 5(1)(c)(ii)–(iii), and s 13(2)(b)(ii), 13(2)(i)(iii)(C) and 13(2)(j)(iii).

They are also explicitly included in the new duties on the Chief Executive to provide a practical commitment to the principles of te Tiriti o Waitangi by ensuring (amongst other things) that Oranga Tamariki's policies, practices and services have regard to mana tamaiti, the whakapapa of Māori children and the whanaungatanga responsibilities of their kinship groups (s 7AA(2)(b)).

Just as importantly, the new purposes and principles also recognise and affirm the central role of the kinship group in the lives of tamariki Māori. See, for instance, s 4(1)(c), (d) and (h), s 5(1)(c)(i)–(vi), s 5(1)(d)(ii), s 13(2)(b)(i)(A)–(C), s 13(2)(e)–(j); and also the extensive references in the ss 7 and 7AA duties on the chief executive to support the role of the kinship group and to avoid children being alienated from their kinship group, and the related values of cultural identity, belonging and connection.

Cultural identity, belonging and connection

Cultural identity and a sense of belonging and connection are important values and are repeatedly emphasised, as the following provisions make clear:

- cultural identity and belonging are inherent in the tikanga of mana tamaiti (the intrinsic value and inherent dignity derived from the child's whakapapa "and their belonging to a whānau, hapū, iwi"), whakapapa (the multigenerational kinship relationships that help to describe who the person is) and whanaungatanga (the wider kinship ties that ensure the maintenance and protection of the child's sense of belonging, identity and connection) (mana tamaiti — ss 4(1)(a)(i), 4(1)(g), 5(1)(b)(iv), 13(2)(b)(ii) and 7AA(2)(b));
- the child-centred and holistic approach that considers, amongst other things, the child's whakapapa and cultural identity (s 5(1)(b)(vi)(C)–(D));
- the recognition of the child's place within their kinship group and, in particular, the child's "sense of belonging [and] whakapapa" (s 5(1)(c)(iii));
- decisions about placement should be guided by considerations of kinship connection (s 13(2)(i)(iii)) and, in particular, the child should be placed where they "can develop a sense of belonging and attachment" (s 13(2)(i)(iii)(E)); and
- a child in the care and protection system should receive "special protection and assistance" to address their particular needs including "identity needs", to preserve their connections with their kinship group and siblings, and to respect the importance of their whakapapa (s 13(2)(j)(i)–(iii)).

The "well-being and best interests" of tamariki Māori

From this brief survey it can be seen that the Act now reflects the reality that, for tamariki Māori, a sense of belonging and identity comes not only from their kinship ties to parents, siblings and immediate and extended whānau, but also from whakapapa links to tūpuna, whenua and wider kinship groups (hapū and iwi).

Maintaining and protecting the child's sense of belonging, identity and connection is integral to their well-being — as encapsulated in the s 5 principle that the child's well-being must be at the centre of decision-making that affects them and, in particular, that "mana tamaiti (tamariki) and the child's ... well-being should be protected by recognising their whakapapa and the whanaungatanga responsibilities of their family, whānau, hapū, iwi, and family group".[38]

The Act also requires, of course, that children are to be protected from harm, "including harm to their development and well-being" (s 4(1)(b)(i)). Since for tamariki Māori, consideration of "well-being" is inextricably linked with whakapapa, whanaungatanga and cultural identity, belonging and connection, so "harm" must be understood to include past, present and future damage to those cultural connections:[39]

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Do our risk assessments take sufficient account of *longitudinal harm*? Are they appropriately cognisant of the growing body of evidence as to the *contribution of cultural disconnect* on negative life outcomes? If we find those longitudinal harms present how do we balance them with the more immediate harm?

What does this mean for Family Court decision-making?

The Act now encompasses wider considerations from a tikanga Māori perspective of the concepts of identity, belonging and attachment within a kin matrix, the harms caused by cultural disconnection and alienation, and the measures that protect and support the "well-being and best interests" of tamariki Māori within their kinship group. Tamariki Māori are to be considered in the context of their whānau, hapū and iwi.

This is a child-centred (s 5(1)(b)), holistic (s 5(1)(b)(vi)) framework in its truest sense, recognising that from birth tamariki Māori have whakapapa ties to tūpuna and whenua as well as to their whānau, hapū and iwi, and that whakapapa and whanaungatanga are integral to their well-being — as expressed in the whakatauki cited earlier: "E kore au e ngaro, he kākano i ruia mai i Rangiātea/I will never be lost, for I am a seed of Rangiātea."

Cultural belonging (attachment), and the harms caused by past, present and future disruptions to cultural identity and connection, must therefore be central considerations when the Family Court is determining the care pathway that will truly meet the "well-being and best interests" of tamariki Māori.

Application of tikanga Māori in recent cases

A number of recent cases in the Family Court and High Court affirm the centrality of tikanga Māori in determining the well-being of tamariki Māori. The following is a brief survey:

- The 2019 amendments reflect "a far more sophisticated and nuanced concept of well-being" and also "bring into more acute focus the rights of children, and the rights and obligations of families, whānau hapū and iwi of children subject to the care and protection system and of the state"; the new provisions "unquestionably call for interpretation of care and protection laws with a *Te Ao Māori lens*".[40]
- The new guiding principles (ss 5 and 13) "recognise, amongst other things, that mana tamaiti, whakapapa and the exercise of whanaungatanga responsibilities are constituents of a child's well-being" and the "purposes and principles of the OTA make clear that *identity is a crucial foundation of well-being*.[41]
- The "historical legislative context suggests that the 2019 amendments demand that decision makers *cast the net wider in evaluating well-being*."[42] Judge Otene reiterated her previously expressed view that:[43]

  > the balance of the principles continue to weigh with heft in favour of the wellbeing 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.

- The policy of the OTA ... emphasises the requirement to see a *Māori child within a kin matrix*. This is identified in the first purpose of the Act contained in s 4(1)(a)(i) by reference to *mana tamaiti*, the intrinsic value and inherent dignity derived from a child's whakapapa and their belonging to a whanau, hapū, iwi or family group in accordance with tikanga Māori. Of particular importance is the child's *whakapapa*, the multi-generational kinship relationships of a person which help to describe who the person is in terms of their mātua (parents) and tūpuna (ancestors) from whom they descend. The importance of whakapapa is identified in the concept of *whanaungatanga*.[44]
- "The principles ... emphasise that a child cannot be considered separate from or cut from ties arising from birth heritage. Section 4A requires that the Court consider mana tamaiti. A child's mana derives from its whakapapa".[45]
- Where "... the state must step in they need to do so in a way that ... does not exclude whānau and that gives practical application to their ongoing involvement. [There is] an obligation that the mana of a Māori child needs to be enhanced and promoted and maintained and this can only be done through the recognition and practical promotion of whanaungatanga and whakapapa".[46]
- "To begin an analysis of the wellbeing and welfare of a Māori child it is necessary to understand that whānau and collective relationships underpinned by whanaungatanga or kinship are at the core of being Māori. The starting point then is that a Māori child must be understood in terms of the broader tikanga context which places the child within their whakapapa and recognises whanaungatanga which embraces whakapapa and focuses on obligations within relationships".[47]
- "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. ... I consider the language of the Act mandates the Court and Oranga Tamariki to take *active steps* to promote the values of mana tamaiti, whanaungatanga and whakapapa in the well-being and best interests of tamariki Māori. The relevant te ao Māori value here is that no tamariki Māori is alone. Every tamariki is a taonga. There will be whānau, hapū and iwi willing to assume their responsibilities to the child. The duty on Oranga Tamariki is to cast the net wide enough to identify those persons who have responsibilities to the child and for the Court then to promote those links on an ongoing basis having, of course, taken into account any relevant safety considerations".[48]
- The "test to be applied to tamariki Māori must have regard to te ao Māori (or the Māori worldview), which sees guardianship as the collective responsibility of whānau, hapū and iwi and not in terms of the responsibility of a nuclear family consisting of the child, its birth parents and any siblings".[49]
- The Family Court's expectation that Oranga Tamariki social work practices will support culturally appropriate placements has been made clear in numerous judgments, including in relation to the need for social work coordination and communication,[50] early planning[51] and care plans to address the cultural needs of tamariki Māori.[52]

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Return to kin care? — placement stability/attachment vs culture

Recent "return to kin care" (or "reverse uplift") cases[53] highlight the difficulties that can arise in meeting the child's need for a "safe, stable and loving home"[54] (a stable placement with an attachment to caregivers) *and* their cultural needs (for cultural identity, belonging and (re)connection to their whānau, hapū and iwi), particularly in non-culturally matched placements.

Cultural belonging, connection and the construction of cultural identity are complex processes. So too are evaluations based on monocultural attachment theory of placement stability, attachment to caregivers and predicting the risks of disrupting attachments; the complexity and difficulties involved in these evaluations and predictions are particularly acute in cases where children have experienced significant trauma in their young lives and where it is important to minimise the risks of any further trauma or disruption.

As the following discussion illustrates, much remains to be explored and doing so will require the Court — as well as Oranga Tamariki, lawyers and other professionals in the family jurisdiction — to seek to understand and value tikanga Māori perspectives. But even in difficult cases where stability and continuity of care and avoiding disruption and harm to vulnerable children are (understandably) central considerations, a way must be found to reconcile children's need for both stable care and attachment as well as their life-long needs for cultural belonging and identity.

Moana's case

The recent high-profile "Hawke's Bay reverse uplift" case involving "Moana" clearly illustrates the difficulties and the courts' failure to provide for both the child's need for stability *and* her cultural needs.[55]

The facts of the case

The circumstances of Moana's case are set out in detail in the Family Court judgment[56] (the parties' names as used in the High Court appeal judgment are used in the following discussion, for ease of reference).[57]

The essential, uncontested facts were that Moana, a young Māori child who had had traumatic experiences in her early years, had been in a stable and caring placement with the Smiths (non-kin, Pākehā caregivers) in the Hawke's Bay, the rohe of her iwi Ngāti Kahungunu, for three years by the time of the Family Court hearing (at which point she was five years old) and four years by the appeal hearing (six years old). Her mother and older siblings, to whom she was attached, lived elsewhere in Hawke's Bay. The prospective carers, the Taipas, were from Moana's iwi Ngāti Kahungunu, lived at a papakāinga in Wellington with Moana's youngest brother and about 60 other family and whānau, and were "immersed in Māori tikanga on a daily basis".[58] Moana's attachments to the Taipas and younger brother in Wellington were said to be "developing"[59] and Moana's mother supported Moana moving to the Taipas' care.[60]

Kin vs non-kin carers: a "contest"?

The central question was whether it was in Moana's "well-being and best interests" to remain with the Smiths (non-kin) or whether she should be transitioned to live with whānau (the Taipas and her younger brother). Judge Callinicos characterised this as a "*contest* between blood links and non-kin relationships".[61]

On the question of Moana's cultural needs, the judge recognised that the Taipas "possessed ... all the skills and attributes to meet Moana's cultural needs"[62] — they were immersed in te ao Māori and had knowledge of tikanga Māori and connections with whānau.[63] The Pākehā caregivers did not but the judge considered they had "capacity and willingness to embrace and support the cultural needs",[64] and with "adequate supports" from Oranga Tamariki (to identify Moana's whānau and whakapapa), Moana "could *develop an increasing cultural connection*".[65] In the judge's view:[66]

> While the capacity to develop ... cultural connections would likely be much greater for a child living with culturally connected whānau than with non-Māori, *it cannot be said that it is impossible that a tamariki would not be able to develop a level of connection if living with non-Māori*. Much depends on the quantity and quality of cultural supports and networks that are provided.

Judge Callinicos concluded that "both sets of caregivers can provide Moana with high quality parenting, love, stability and security",[67] but it transpired the lengthy duration of the placement with (and resulting attachments to) the Smiths was the single most important factor for Judge Callinicos and outweighed cultural considerations. There was significant criticism of Oranga Tamariki organisational and social work practices in the case,[68] and the delay had resulted in Moana forming secure attachments to the Smiths. The Family Court's analysis of the evidence and legislative factors was upheld on appeal,[69]

The psychological evidence — attachment, placement stability and risks of disruption

Expert psychological evidence (Mr Dwyer) as to the strength of various attachments, and the potential risks of disruption and trauma associated with a change of placement, was considered at length. This evidence was decisive in Judge Callinicos reaching the determination (upheld on appeal) "*by a significant margin*" that Moana's well-being and best interests "*can only be met* by her remaining in Hawke's Bay, with a strategy of increasing integration with the Taipas and the provision to the Smiths of the *proper support of Moana's cultural connections and needs*" that the Smiths had requested from Oranga Tamariki.[70]

Moana had developed "a significant psychological attachment" to the Smiths and they therefore came within the s 2 definition of "family group":[71]

> An important consideration for any child is to remain in proximity to family group and whānau. The evidence shows that the Smiths are now within the definition of family group as they are both people with whom Moana has developed "a significant psychological attachment"; s 2.

Mr Dwyer outlined the complex issues involved in weighing the potential risks and benefits of moving Moana from her current placement to kin care, relating to risk and protective factors, trauma and resilience and the difficulties associated with risk assessment and predictions. He noted:

- that "*an overriding reason* for a change in placement would be whether [Moana's] current placement *sufficiently supported her whānau connections and cultural needs* [because] ... if a placement undermined the cultural or whānau connections then this could in turn cause a real risk that children grow into confused and troubled teenagers";[72]
- "it was not for him to determine whether [cultural] concepts should outweigh attachment and that *it is very difficult to rank the importance or significance of each in determining a decision on placement, or a change to one*.

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> Instead his role was to provide as much information as he can to enable that decision to be best made";[73]

- children are capable of forming attachments with multiple people (as would likely be the case with the Taipas),[74] although geographic proximity to Moana's mother and siblings in Hawke's Bay was a factor in favour of remaining in the current placement in that region;[75]
- noting also that any change of placement would need to be carefully handled over time (a gradual transition);[76] and
- disruption to a secure attachment could be risky and might cause further trauma and impact healthy development — evidence described by Judge Callinicos as "potent" and by Cull J on appeal as "critical".[77]

On appeal, Cull J traversed the psychological evidence in detail and agreed with Judge Callinicos' assessment of the psychological attachments Moana had formed with the Smiths and:[78]

> the potential future risks to Moana's emotional and psychological development, if she were uplifted to another placement ... albeit to a safe, supportive and culturally connected placement [with the Taipas].

and the need for "damage control or curtailment of further risk".

The tikanga evidence — "cultural identity, belonging, connection"

Expert tikanga evidence (Mr Walker) was also considered,[79] including the views of Mr Tomoana, Ngāti Kahungunu leader, that "descendants of Ngāti Kahungunu should not be placed in non-kin care and that tamariki should be cared for by people of Ngāti Kahungunu".[80]

Mr Walker believed that it would be "extremely difficult" for Moana to be connected with her culture if she remained living with the Smiths;[81] there would not be the same opportunities in terms of inculcation of values[82] and there were risks of a child missing a "component of well-being, ... taha wairua, where their connection with their whakapapa is not strong".[83]

Judge Callinicos would have liked deeper exploration of:[84]

> the extent to which a child raised by tauiwi [non-Māori] might still be able to develop an increasing connection with their Māori culture by way of such things as; cultural learnings and education, establishment of connections with a hapū marae ..., alongside increasing proximity to people like the [Taipas], ...

but the issue remained unresolved.

Kin care an "unachievable ideal"?

Judge Callinicos, while finding the tikanga evidence and cultural guidance "helpful",[85] considered kin care was an "ideal" that was not realistically achievable in this case[86] and that the Court was "bound by statute to consider factors beyond solely cultural or tikanga perspectives".[87] It was only one factor in a matrix of considerations in a holistic, child-centred assessment:[88]

> While wholly respecting the mana of Ngāti Kahungunu and its views as conveyed through Mr Tomoana that every tamariki of Ngāti Kahungunu must be cared for within that iwi, the statutes under which Moana's plight is being determined impose on the Court an holistic approach. Until such time as Parliament gives statutory effect that the views of an iwi are the start and end points, the determination must be by reference to the holistic factors in the statutes, which include the taking into account of such important cultural perspectives as part of the matrix of considerations.

This somewhat dismissive treatment of the expert tikanga evidence is troubling. It also fails to apply the Act's purposes and principles; it is true the Act does not treat the iwi's views as the only consideration ("the start and end points"), but, as set out earlier, the Act *does* make tikanga Maori (including mana tamaiti, whakapapa and whanaungatanga) central considerations in the Act's purposes and principles in relation to tamariki Māori and their whānau, hapū and iwi — including the requirements to protect the child's sense of identity, belonging and connection.

In Moana's case, the tikanga provisions relating to cultural identity, belonging and connection were given relatively cursory consideration,[89] and were not considered determinative in the Court's holistic analysis.

Judge Callinicos did acknowledge that the principle of mana tamaiti — that the child's "well-being should be protected by recognising their whakapapa and the whanaungatanga responsibilities of their [kinship group]" (s 5(1)(b)(iv)) — was "very much one that *has not yet been implemented*" for Moana. The judge went on to say that the option of a placement with the Taipas, "who share an iwi link, offers *a pathway* for pursuit of this principle. It offers whakapapa links and whānaungatanga opportunities".[90] But this pathway was not taken.[91]

Concerns about the longer-term cultural harms of loss of identity and connection — raised by both the psychologist and tikanga expert — were also not explored. Instead, Judge Callinicos concluded that Moana's cultural connections had already been impacted and that the:[92]

> deficits that Moana has suffered in terms of whānau or cultural connections must be accepted as *an unfortunate consequence* of all that has occurred [but] the solution to those failings is not to remove her from a safe haven[,]

notwithstanding that the judge had accepted the Taipas could also provide a safe haven. Similarly, Cull J on appeal characterised it as a case where "the horse had bolted".[93] This is a remarkably short-term perspective, given the expert psychological and cultural evidence as to life-long cultural needs of identity and connection.

Instead, Judge Callinicos considered that Moana's cultural needs would be "supported" by her Pākehā caregivers who in turn were to rely on Oranga Tamariki providing information about Moana's whakapapa and wider whānau.

This is an ironic directive (particularly given Judge Callinicos' extensive criticisms of the department's shortcomings in the case): the judge is relying on a government department that has long been recognised, including by the Waitangi Tribunal in its 2021 Wai 2915 report, as failing Māori and severing whakapapa connections, to teach Pākehā caregivers about keeping a Māori child culturally connected. This clearly falls short of the tikanga expert evidence put before the Court regarding cultural connection and the inculcation of cultural values.

The judge also considered that Moana's cultural needs would be supported by her remaining in the same geographic region as her mother, older siblings and other (yet to be identified) wider whānau[94] — notwithstanding the tikanga expert's evidence that whakapapa and whanaungatanga ties did *not* require co-location:[95]

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> Although Moana may whakapapa to many people locally, [Mr Walker] did not see that as a basis that she should stay in Hawke's Bay. Where a Māori person might be does not diminish from where they affiliate," and "Merely because a person resides in the geographical location of another Iwi, it does not mean they lose their inherent whakapapa relationships.

A change of placement ("reverse uplift") — risks

In the final analysis, the risk of disrupting Moana's placement with her non-kin caregivers was considered by the Family Court to be the most significant factor, and this was upheld on appeal.[96] Despite being mentioned,[97] the option of a carefully managed transition over time to the kin caregivers, the Taipas, was not pursued, even though they were considered capable of providing Moana with high quality parenting, love, stability and security. It appears Judge Callinicos interpreted a "stable" placement as meaning "unchanging" or "static".

We consider an alternative, and better, interpretation is that the move from non-kin placement to kin caregivers must be sensitively handled to avoid abrupt changes that compound earlier trauma. In Moana's case, this would have enabled the apparent tension between the needs for a "safe, stable and loving home" and life-long needs of cultural identity, belonging and connection, to be reconciled through a plan for a managed transition. The two requirements could then have been treated equally, rather than as a "contest" in which cultural connections were in effect traded-off. The holistic analysis required by the Act should be to determine which caregiver can best provide both a stable home *and* recognise mana tamaiti, whakapapa and whanaungatanga.

"The best of both worlds"?

Judge Callinicos considered the outcome of Moana remaining with her Pākehā caregivers gave her an "opportunity to explore her te ao Māori dimension" (via Oranga Tamariki) and that she deserved "a safe and stable pathway to ensure she grasps the tools of both cultures: not merely one of them".[98] Similarly, Cull J characterised the outcome as "*the best of both worlds*".[99]

It was undoubtedly a difficult situation but it is not credible to describe the outcome as the best of both worlds. The outcome — a young Māori child remaining with non-kin carers and being raised in a Pākehā setting (albeit with so-called cultural "supports") — is not consistent with the tikanga Māori values in the Act's purposes and principles, which treat whakapapa and whanaungatanga as intrinsic to mana tamaiti and the well-being of tamariki Māori. It cannot be acceptable for the courts to point to a litany of failures in Oranga Tamariki social work practice as justification for treating permanent placement of a Māori child with non-kin Pākeha caregivers as a "fait accompli" when a safe, stable, loving kin care placement is available.

Moana's case, like so many before the Family Court, involved complex facts and difficult issues. Our focus is not on relitigating the case, but rather using it to highlight significant questions that have not yet been fully explored by the Court and that urgently need to be resolved. These are outlined in brief in the next section.

Significant questions for the Family Court

Clearly, the return to kin care cases in particular raise difficult issues for the Family Court in applying the cultural provisions in the new legislation as part of the required holistic, child-centred analysis of the well-being and best interests of tamariki Māori.

The issues will be canvassed in future cases, including in the higher courts. But there is a pressing need to resolve two critical questions arising from the recent cases: what is needed for placements to truly meet children's needs for cultural identity, belonging and connection, and can the Court's use of Western attachment theory be adapted to recognise these cultural needs?

These are difficult questions that deserve full exploration. The brief discussion that follows suggests some aspects for the Court to consider and debate with tikanga experts and other professional advisers working in the family jurisdiction.

What is needed to fulfil cultural identity, belonging and connection needs?

Is culture "lived" — or can it simply be "visited"? In Moana's case, the Family Court believed that tikanga Māori including mana tamaiti, whakapapa and whanaungatanga would be adequately met by Pākehā carers who had expressed willingness to "support" her cultural heritage. Mrs Smith was for example "learning te reo, was speaking some at home and using it in songs and games",[100] had tried to equip herself with more knowledge of cultural aspects of Ngāti Kahungunu and had repeatedly asked Oranga Tamariki for information about Moana's whakapapa and pepeha.[101]

The judge was satisfied on this basis that the Smiths "would be able to meet the full range of [Moana's] cultural needs"[102] and concluded that:[103]

> While the capacity to develop ... cultural connections would likely be much greater for a child living with culturally connected whānau than with non-Māori, *it cannot be said that it is impossible that a tamariki would not be able to develop a level of connection if living with non-Māori*. Much depends on the quantity and quality of cultural supports and networks that are provided.

Similar views were expressed in *Chief Executive of Oranga Tamariki — Ministry for Children v RB*, where Pākehā non-kin carers (related to the father by marriage but not by blood) who had early childhood education skills and rudimentary te reo and who were "willing to foster the children's cultural heritage"[104] were said to have "cultural competence" to supplement and support the children's engagement with their iwi.[105]

The judge considered this "cultural competence" actually exceeded that of the children's Ngai Tahu grandmother:[106]

> There is a commitment by the maternal grandmother to further develop the children's identity, cultural development and engagement. This is an important step in protecting the children's mana tamaiti and wellbeing,

but:[107]

> The cultural report identifies that *the family has been lost for several generations*. *The cultural report identifies an excitement and anticipation of reconnection* and I consider these children should be part of that. However, I consider that these children can be part of that from the strength of the current care placement,

and:[108]

> My observation over the five days of hearing evidence is that these caregivers are more than capable of being able to develop the boys' awareness of their Māori cultural heritage and have already done so. On the other hand, while Grandmother has identified a sense of loss of her cultural heritage and a willingness to engage in the future, she has not as yet taken any significant steps to engage with the marae. The [cultural] report has helpfully shown a way forward for Grandmother to connect to the maternal family heritage.

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Judge Matheson's conclusions were not supported by the cultural report, which recommended the children be moved to their Ngai Tahu grandmother's care.[109] Worryingly, the judge does not appear to have considered the complexities involved in cultural reconnection (and the wider context of the damaging impacts of colonisation) and the need to support the process of reconnection — imperatives that underpin the Act's purposes and principles.

Similarly, Judge Callinicos' conclusion in Moana's case also disregarded the expert tikanga evidence, including by Ngāti Kahungunu rangatira Mr Tomoana, about the ways in which cultural knowledge, values and connection are maintained and sustained. The result in both cases falls far short of the "active steps" mandated by the High Court.[110] As previously noted, the Waitangi Tribunal described te Tiriti guarantee of te tino rangatiratanga over kāinga, as the:[111]

> continuity of chiefly authority over the village, over the home, [as] a guarantee of the right to continue to organise and live as Māori. ... it is a guarantee of the right to cultural continuity. Fundamental to that is the right to care for and raise the next generation.

This raises the question whether fundamental cultural concepts can be reliably applied by judges who have no background or depth of understanding in te ao Māori. While judges may be able to undertake the intellectual exercise that judicial decision-making calls for, arguably something more than working through the required statutory considerations is required. An alternative decision-making forum, such as a panel incorporating a member with appropriate knowledge of tikanga Māori, should be considered as a way of achieving Parliament's intentions in the 2019 legislative changes, of transformational reform and cultural responsiveness.[112]

Indigenous child protection — does our legislation go far enough?

It should also be noted that our legislation, which requires that "preference should be given" to placing tamariki Māori with whānau, hapū and iwi (s 13(2)(i)(iii)(A)), falls short of the requirements for indigenous child protection found in comparable jurisdictions:

- *United States of America*: When placing Native American children who are in statutory care, the court *must* follow a preferred order of placement with Native American carers unless the court finds "good cause to the contrary".[113]
- *Queensland*: When placing an Aboriginal child who is in statutory care, the chief executive "*must, if practicable*" place the child with a member of the child's family group; and, if it is not practicable, the chief executive *must* follow a ranked order of placement with Aboriginal carers or at least a person who can maintain connection with "kin, country and culture".[114]
- *Ontario*: When placing a First Nations, Inuk or Métis child who needs statutory care, "unless there is a substantial reason for placing the child elsewhere" the court *must* place the child with their extended family or, if that is not possible, with another First Nations, Inuk or Métis family.[115]

The question, not for the Family Court but for Parliament, is whether the Act should be amended to include a clearer direction to place tamariki Māori who need care with their whānau, hapū and iwi, to avoid perpetuating the cultural disconnection highlighted in Moana's case and other reverse uplift cases.

Unfortunately, at the time of writing, the current government has signalled its intention to weaken rather than strengthen the Act's cultural focus by proposing to repeal s 7AA.[116] The Waitangi Tribunal has conducted an urgent hearing and reported its findings that the repeal would constitute "clear breaches of the article 2 guarantee to Māori of tino rangatiratanga over kāinga and of the Treaty principles of partnership and active protection" and that:[117]

> prejudice will arise from this rushed and arbitrary repeal of section 7AA ... due to the significant risk of actual harm to vulnerable tamariki and the risk of erosion of trust among Māori whānau and communities.

It remains to be seen what the ultimate legislative outcome will be.

Exploring attachment theory — is it fit for purpose?

The outcome in Moana's case is consistent with indigenous child protection cases in other jurisdictions, where caregiver attachment has traditionally been regarded as a more important determinant than cultural connection of the child's best interests and has been used to justify the permanent placement of indigenous children in non-indigenous homes.[118]

Attachment theory has been used for many decades by the courts in New Zealand and elsewhere as a basis for making decisions about child welfare, but the way in which it is used needs to be re-examined. Use of attachment theory in child protection and custody decisions in family courts in many jurisdictions has raised concerns about misunderstandings and misapplication of the theory in determining the "best interests" test.[119] The theory originally focused on the mother-child bond and while it has evolved since then to recognise that multiple attachments can form and re-form over time, it is still rooted in individualism and the Western model of the nuclear family. The theory has been criticised, in Aotearoa and elsewhere, for being monocultural.[120]

Dr Atwool, a New Zealand expert in social work, attachment trauma and resilience, has noted that the need for greater cultural awareness in thinking about attachment and parenting is:[121]

> ... particularly pertinent in the Aotearoa New Zealand context where despite our small population there are significant cultural differences. For example, I have argued that in a Māori context whakawhanaungatanga (forming and maintaining extended family connection) may be a more appropriate concept than attachment. This is not to say that they are one and the same. While both emphasise the importance of relationships, each embodies important aspects of the cultural context in which they originated. Whānau is not the same as the Pākehā concept of nuclear family and is likely to comprise a collection of households (Metge & Ruru, 2007) ... When decisions are being made about out-of-home placement the cultural distinction between whanaungatanga and attachment becomes highly significant. The former emphasises the importance of continuing connection to whānau, hapū and iwi, while the latter emphasises the importance of secure attachment to an attachment figure. ... *failure to take account of this distinction has resulted in the perception that Māori children are misplaced in the care system.* ... The notion of attachment to a single figure irrespective of cultural considerations is rejected as an appropriate resolution for Māori children who are not safe within their immediate whānau (Metge & Ruru, 2007).

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Dr Atwool has pointed to lack of cultural connection as a potentially significant risk factor, and conversely that the potential for cultural connection to contribute to children's resilience needs to be explored:[122]

> *Culture is not an optional extra for Māori and Pasifika children and young people*; it is visible, shaping internal and external processes (Mead, 2003; Metge & Rum, 2007; Mila-Schaef, 2006; Rangihau, 1982) ... whanaungatanga and the Pasifika equivalent (aigataga) may be a more appropriate concept than attachment. Children are only able to experience attachment to wider social structures through their primary attachments to the people most involved in their care. Culture is only an asset when children are connected and grounded. It becomes even more important when the culture to which they belong is treated as 'other' by the dominant culture (Walker, 1997).

Conclusion

It is apparent from recent cases that the Family Court has struggled to find a balance between placement stability (underpinned by Western attachment theory) and life-long needs for cultural belonging, identity and connection as an integral part of the mana tamaiti and well-being of tamariki Māori.

In our view, tikanga Māori including mana tamaiti, whakapapa and whanaungatanga have not yet been fully explored and given sufficient weight in determining the well-being and best interests of tamariki Māori. The onus is on Oranga Tamariki to ensure culturally appropriate placements at the earliest opportunity, but substantive responsibility also rests on the Family Court — from the point of entry into care, the time in care, and on exit — to ensure a truly holistic assessment of the needs of cultural identity, belonging and connection, alongside attachment to non-kin caregivers, even where there is a narrow and difficult pathway to achieving mana tamaiti:[123]

> Removal [from non-kin caregivers] is traumatic, all the more so because [the children in care] have experienced previous disruption and trauma. What is needed is engagement with carers, the children in their care and whānau to ensure the development of pathways forward that meet all of the children's needs.

As well as meeting immediate needs for safety and stability, the Court must also consider a longer-term view of cultural well-being. As Dr Atwool notes:[124]

> Statutory involvement in children's lives is not just about the here and now, it carries substantive responsibility for the future. All children need stability and continuity of loving care to achieve their potential. Their future wellbeing also depends on knowing who they are and where they came from.

The 2019 amendments hold the promise — after nearly 200 years of colonisation — of a care and protection system that truly recognises the cultural needs of Māori tamariki, whānau, hapū and iwi. Delivering on that promise will depend in large part on the Family Court being actively engaged and fully informed about cultural well-being. Otherwise, as a country we will be condemned to repeat the mistakes of the past, as so aptly expressed in *Puao-Te-Ata-Tu* many decades ago:[125]

> We do not think cases involving Māori children ought to be determined solely in accordance with Western priorities, or that those who do not have a Māori experience or training, are adequate arbiters or advocates of the best interests of the Māori child. We do not think the law should be weighted to denying the facility of Māori communities to care for their own in the way they best know how.

Footnotes

1. The whakataukī refers to the whakapapa of Māori to the original migration point, Rangiātea in Te Moana-nui-a-Kiwa (the Pacific Ocean), and illustrates the importance of connection for future well-being.
2. Māori Perspective Advisory Committee *Puao-te-ata-tu: The Report of the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare* (Department of Social Welfare, SW 470, September 1988).
3. The Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill 2016 inserted new ss 4, 4A, 5, 7AA and 13 in the Oranga Tamariki Act 1989/Children's and Young People's Well-being Act 1989 (the 1989 Act), which came into force on 1 July 2019.
4. *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (May 2019) at [43] and [47]. See also Amohia Boulton and others *Te Taniwha i te ao ture ā-whānau: whānau experience of care and protection in the Family Court* (July 2020).
5. "I walk backwards into the future with my eyes fixed on my past": the idea that we should look to the past to inform the future is a whakataukī (Māori proverb) that speaks about Māori perspectives of time — the past, present and future are intertwined.
6. See for instance recent statistics in the Waitangi Tribunal's *He Pāharakeke He Rito Whakakīkīnga Whāruarua* (Wai 2915, 2021) at xiv, Appendix II; and Royal Commission of Inquiry into Abuse in State Care *Interim Report on Abuse in Care, Vol 1* (December 2020) at 62 [*Interim Report on Abuse in Care*].
7. Wai 2915, above, at xiv and see also at 176:

   > The Crown acknowledges the disproportionate number of tamariki Māori entering and remaining in care is undesirable and unacceptable. While the causes of this inequity are complex, it has been accepted that a significant contributing factor has been the ongoing effect of historical injustices on iwi, hapū and whānau.

8. Wai 2915, above n 6, at p xv.
9. For historical accounts of the impact of colonisation on Māori society and subsequent cultural alienation and whānau dysfunction, see *Interim Report on Abuse in Care*, above n 6, at 60–61; and see also Nicola Atwool "Who cares?: the role of attachment assessments in decision-making for children in care" (PhD Thesis, 2008) at 23–51.
10. Wai 2915, above n 6, at 179 (emphasis added).
11. Wai 2915, above n 6, at 186
12. Above.
13. Wai 2915, above n 6, at 175.
14. Wai 2915, above n 6, at 178 (emphasis added).
15. Wai 2915, above n 6, at 178.
16. Wai 2915, above n 6, at 181, citing Hector Kaiwai and others *Ko Te Wā Whakawhiti/It's Time for Change* (February 2020) at 74.
17. Wai 2915, above n 6, at 191.
18. *Interim Report on Abuse in Care*, above n 6, at 25, 81 and 91.
19. *Interim Report on Abuse in Care*, above n 6, at 94.

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20. Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Maori Dimension in Modern New Zealand Law" (2013) 21 Waikato L Rev 1 at 23:

> Traditionally the whanau, at least three generations deep comprising more than two nuclear families and co-resident at a resource complex, was the centre of Māori life. It was the primary unit of close identity and belonging, the primary unit of social rights and obligations and, at a practical level at least, the primary unit of economic rights and obligations.

21. Khylee Quince "Nourishing the Seed: New Challenges under Oranga Tamariki" (paper presented to the New Zealand Law Society Continuing Legal Education Conference "Advanced Lawyer for Child — Out of the Comfort Zone Intensive", Wellington, May 2018).
22. Atwool, above n 9, at 8 (footnotes omitted and emphasis added).
23. Williams, above n 20, at 24.
24. Above.
25. Williams, above n 20, at 24; and Māori Perspective Advisory Committee, above n 2.
26. Williams, above n 20, at 24.
27. Address to the New Zealand Family Court Judges' Triennial Conference, Christchurch, 11 October 2017, cited in *Oranga Tamariki, Ministry for Children v AR* [2020] NZFC 4046 at [70] per Judge Courtney.
28. Williams, above n 20, at 24, referring to the 1989 Act, s 6 "welfare and interests" as the first and paramount consideration — the predecessor to the current s 4A "well-being and best interests" paramountcy principle.
29. Williams, above n 20, at 24.
30. Atwool, above n 9, at 32.
31. Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill 2016 (No 224), First Reading (18 December 2016, Anne Tolley (Minister for Social Development)). It should also be noted, however, that the Bill passed by only one vote, with many submitters and opposition parties (including the Māori Party) opposed to the Bill, a principal concern being that that the language did not adequately recognise and protect Māori cultural identity and belonging: see Social Services Select Committee Report (June 2017) and (6 July 2017) 723 NZPD (Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill and Vulnerable Children Amendment Bill — Third Reading, Anne Tolley).
32. Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill 2016 (No 224) *Investing in Children: Legislative support for improving outcomes for Māori children and young people* (Ministry of Social Development, Regulatory Impact Statement, November 2016) at [90].
33. Sharyn Otene "Te He Hurihanga Tuarua? — Examnining amdendments to the Oranga Tamariki Act 1989 that took effect on 1 July 2019" (2019) 9 NZFLJ 139 (cited in *AR*, above 27, per Judge Courtney:

> ... the repeated recognition of tikanga Māori concepts of mana tamaiti (tamariki), whakapapa and the practice of whanaungatanga in the purposes and principles of the Act re-emphasises the policy drawn from the recommendations of Puao-te-Ata-Tu and can be taken as a Parliamentary statement that those charged with administration of the Act, including the judiciary, have not effected the legislation as originally intended so the legislature has therefore made its intent clearer.

34. For a discussion of the interaction (and the differences) between the two Acts, see *Chief Executive of Oranga Tamariki — Ministry for Children v MQ* [2021] NZFC 9089, [2021] NZFLR 1 at [34]–[39] per Judge Callinicos.
35. Care of Children Act 2004, s 4 (CoCA), the first and paramount consideration for decision-makers (the equivalent test to the Oranga Tamariki Act 1989, s 4A (OTA) "well-being and best interests" paramountcy principle). For a recent discussion of the CoCA, s 5(e) and (f) cultural principles, see *Hopkins v Jackson* [2022] NZHC 2649, [2022] NZFLR 707 per McQueen J.
36. See *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 338 at Appendix: Statement of Tikanga by Distinguished Professor Sir Hirini Moko Mead and Professor Sir Pou Temara, 31 January 2020, at [30] and [34]: "These fundamental concepts [including mana, whakapapa and whanaungatanga] are intertwined and cannot be defined in isolation or translated by a simple English word. They exist in an interconnected matrix", and "Unlike legislation, tikanga is not compiled in a tidy collection of written books. Although there is increasing published material on tikanga, it is lived and exists as unwritten conventions".
37. Aperahama Kerepeti-Edwards, cited in *C's Father v Chief Executive of Oranga Tamariki — Ministry for Children* [2023] NZHC 184 at [60] per Edwards J and see [58]–[59] and [61]–[64]. See also *Ellis*, above, at the Appendix: Statement of Tikanga, at [91]–[94], regarding the importance of whakapapa to Māori identity: "Whakapapa and knowledge of relationships between people is pivotal to the Māori world and tikanga Māori", "It is through whakapapa that kinship ties are cemented and mana is inherited and intimately connected", and "Whakapapa also creates responsibilities of manaaki (care and nurturing) within the whānau. Like all these concepts, that are inextricably linked, whakapapa is closely linked to the concept of whanaungatanga". Mana and whanaungatanga are discussed at [76]–[87] and [96]–[99].
38. Oranga Tamariki Act, s 5(1)(b)(iv).
39. *AR*, above 27, at [76] per Judge Courtney, citing Otene, above n 33 (emphasis added).
40. *Chief Executive of Oranga Tamariki — Ministry for Children v ZM (decd)* [2020] NZFC 2, [2020] NZFLR 195 at [7] per Judge Otene (emphasis added). Her Honour also noted that, "What that might mean as a matter of general application is for jurisprudential development by decisions in cases thoroughly evidenced and robustly argued. I caveat that this is not such a case".
41. *ZM*, above, at [11] and [13] (emphasis added).
42. *Chief Executive of Oranga Tamariki — Ministry for Children v BH* [2021] NZFC 210, [2021] NZFLR 201 at [23] per Judge Otene (emphasis added).
43. *BH*, above, at [21], citing Otene, above n 33.
44. *AR*, above n 27, at [110] (emphasis added).
45. *Chief Executive of Oranga Tamariki — Ministry for Children v Frye* [2020] NZFC 6519 at [37] per Judge Moss.
46. *Chief Executive of Oranga Tamariki — Ministry for Children v JS* [2020] NZFC 3632 at [32] per Judge Tan.
47. *Chief Executive of Oranga Tamariki — Ministry for Children v Mahima* [2021] NZFC 8742, [2022] NZFLR 204 at [27] per Judge Tan.

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48. *McHugh v McHugh* [2022] NZHC 1174, [2022] NZFLR 168 at [111]–[113] per Doogue J (emphasis added).
49. *McHugh*, above n 48.
50. *Frye*, above n 45.
51. *MQ*, above n 34, per Judge Callinicos. See also discussion in the appeal judgment about the need for "early" and "prompt" planning for placement: *Moana's Mother v Smith* [2022] NZHC 2934, [2022] NZFLR 444 at [52]–[53], [62], [74]–[75] per Cull J.
52. *JS*, above 46, at [24] and [32] per Judge Tan:

> There is a sense that recognising [the child's] connection to his whānau has become a tick box exercise which rather than enhancing his well-being has the unintended consequence of creating uncertainty with his current placement [and] [The] changes that came into force on 1 July 2019 will have nil effect if what is instituted in plans is words that are not backed up with meaningful action. A simple cut and paste of previous plans is insufficient.

53. See for instance *Chief Executive of Oranga Tamariki — Ministry for Children v RB* [2021] NZFC 2754, [2022] NZFLR 967 per Judge Matheson; *AR*, above n 27; and *Chief Executive of Oranga Tamariki — Ministry for Children v Paterson* [2022] NZFC 11180 per Judge Manuel.
54. Oranga Tamariki Act, ss 4(1)(d) & (e), 5(1)(b)(iii) and 13(2)(i)(iii)(A).
55. *MQ*, above n 34. The Family Court judgment, in relation to the evidential and legal analysis, was upheld on appeal: *Smith*, above n 51.
56. *MQ*, above n 34, at [67]–[292] and summarised at [293]–[297]; and *Smith*, above n 51, at [24].
57. Appeal judgment, *MQ*, above n 34; *Smith*, above n 51, at fn 1: Moana ("GW" in the Family Court judgement), Moana's mother (MQ), her caregivers (the Smiths (the Ss)), the proposed kin carers (the Taipas (the Hs)) and the extended whānau are all assumed names, adopted to protect privacy and confidentiality.
58. *MQ*, above n 34, at [251].
59. *MQ*, above n 34, at [296].
60. *MQ*, above n 34, at [244].
61. *MQ*, above n 34, at [56] (emphasis added).
62. *MQ*, above n 34, at [296].
63. *MQ*, above n 34, at [286(s)].
64. *MQ*, above n 34, at [281]–[283] and [296].
65. *MQ*, above n 34, at [296] (emphasis added).
66. *MQ*, above n 34, at [296].
67. *MQ*, above n 34, at [296].
68. *MQ*, above n 34, canvassed at length at [67]–[230], which had contributed to acrimony between the parties and which had compounded Moana's exposure to conflict and anxiety (at [223]).
69. However, the High Court (*Smith*, above n 51) did clarify at [73]–[74] that Judge Callinicos' statement that the (*MQ*, above n 34, at [243] (emphasis added)):

> impact of [the required child-centric approach] must be that what is required to meet the well-being and best interests of a subject child must *trump* the interests of a family, family group, whānau, hapū or iwi where those latter views are in conflict with the former

did *not* mean that the well-being and best interests of the child are assessed separately from the family/kinship group. Instead, the over-arching and paramount consideration is the child's well-being and best interests and that must be assessed holistically, applying the guiding principles under ss 5 and 13. as discussed below.

70. *MQ*, above n 34, at [322] (emphasis added).
71. *MQ*, above n 34, at [316]. This was on the basis of a four-year placement; see also *RB*, above n 53, where a 12-month placement was considered sufficient to make non-kin carers the children's "family group".
72. *RB*, above n 53, at [286(v)] (emphasis added).
73. *RB*, above n 53, at [286(z)] (emphasis added).
74. *RB*, above n 53, at [286(m)].
75. *RB*, above n 53, at [321].
76. *RB*, above n 53, at [286(cc)].
77. *RB*, above n 53, at [286(l)], [286(n)] and [286(o)]; and *Smith*, above n 51, at [126].
78. *Smith*, above n 51, at [118]–[126].
79. *MQ*, above n 34, at [232]–[243].
80. *MQ*, above n 34 at [238].
81. *MQ*, above n 34, at [232(o)].
82. *MQ*, above n 34, at [233(k)].
83. *MQ*, above n 34, at [233(m)].
84. *MQ*, above n 34, at [232(o)].
85. *MQ*, above n 34, at [234].
86. *MQ*, above n 34, at [324]–[328].
87. *MQ*, above n 34, at [235].
88. *MQ*, above n 34, at [234], [242] and [243].
89. *MQ*, above n 34, at [314]–[317].
90. *MQ*, above n 34, at [314(j)] (emphasis added).
91. Compare the outcome in *Paterson*, above n 53, where in a "finely balanced" decision, a return to the child's mother was to be trialled and at [123], "... he has the right, all things being equal, to be cared for and raised in a kin rather than a non-kin setting".
92. *MQ*, above n 34, at [323(i)] (emphasis added).
93. *Smith*, above n 51, at [122].
94. The same outcome (tamariki Māori to stay with Pākehā caregivers rather than move to whānau care), based on similar reasoning, was also reached in *RB*, above n 53. Compare *AR*, above n 27: a Māori child would have been moved to his grandmother's care where cultural upbringing, whakapapa connections and sibling relationships would be fostered, but for safety concerns; the current caregivers, although not related by blood were able to provide an environment fostering tikanga and te reo, and were the next best option. See also *Paterson*, above n 53.
95. *MQ*, above n 34, at [233(d)–(e)].
96. *MQ*, above n 34, at [296]–[297] and [314]–[331]; and *Smith*, above n 51, at [125]–[126].
97. *MQ*, above n 34, at [50] and [286(cc)].
98. *MQ*, above n 34, at [333].
99. *Smith*, above n 51, at [191] (emphasis added).
100. *MQ*, above n 34, at [199].
101. *MQ*, above n 34, at [296].
102. *MQ*, above n 34, at [256].
103. *MQ*, above n 34, at [296] (emphasis added).
104. *RB*, above n 53, at [139]–[140] and [150]. The caregivers had:

> a humble but nevertheless working knowledge of te reo, and through engagement with early childhood education have the skillset to develop an understanding and appreciation of the importance of heritage for the children.

105. *RB*, above n 53, at [153].

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106. *RB*, above n 53, at [187] and [62].
107. *RB*, above n 53, at [182] (emphasis added).
108. *RB*, above n 53, at [140].
109. *RB*, above n 53, at [180].
110. *McHugh*, above n 48.
111. Wai 2915, above n 6, at 179 (emphasis added).
112. Pou Tangata Iwi Leaders Groups (Te Ora o Te Whānau and Justice) co-Chairs Rahui Papa and Kahurangi Dame Nadia Glavish, on behalf of the National Iwi Chairs Forum "Submission to the Justice Select Committee on the Family Court (Family Court Associates) Legislation Bill".
113. Indian Child Welfare Act 1978 25 USC § 1915(b): "a preference shall be given, in the absence of good cause to the contrary".
114. Child Protection Act 1999 (Qld), s 83.
115. Child, Youth and Family Services Act 2017 (Ontario), s 101(5).
116. Section 7AA imposes specific duties on the Chief Executive of Oranga Tamariki so as to provide a practical commitment to the principles of te Tiriti o Waitangi.
117. Waitangi Tribunal *The Oranga Tamariki (Section 7AA) Urgent Inquiry 10 May 2024 Report* (Wai 3350, 2024).
118. See for instance the leading 1983 Canadian case of *Racine v Woods* [1983] 2 SCR 173 (SC), discussed in Peter W Choate and others "Rethinking *Racine v Woods* from a Decolonizing Perspective: Challenging the Applicability of Attachment Theory to Indigenous Families Involved with Child Protection" (2019) 34 Can JL & Soc/La Revue Canadienne Droit et Société 55 at 55–78.
119. For a meta-analysis, see Tommie Forslund and others "Attachment goes to court: child protection and custody issues" (2022) Attachment & Human Development at 1–52.
120. See for instance Peter W Choate and Christina Tortorelli "Attachment Theory: A Barrier for Indigenous Children Involved with Child Protection" (2022) 19 Int J Environ Res Public Health at 8754; Alayne Mikahere-Hall "Tūhono Māori: Promoting secure attachments for Indigenous Māori children. A conceptual paper" (2019) 23 Ata: Journal of Psychotherapy Aotearoa New Zealand at 49–59; and Anna Hinehou Fleming "Ngā Tāpiritanga: Secure attachments from a Māori perspective" (2018) 22 Ata: Journal of Psychotherapy Aotearoa New Zealand at 23–36.
121. Atwool, above n 9, at 171–172 (some citations omitted and emphasis added) and also at 168–169.
122. Atwool, above n 9, at 211 (emphasis added).
123. Nicola Atwool "The collateral damage of ideologically driven uplifts" *Newsroom* (online ed, New Zealand, 27 November 2020), cited in the appeal judgment in *Smith*, above n 51, at [128].
124. Atwool, above.
125. Māori Perspective Advisory Committee, above n 2, at Appendix II, 76.