

Intercountry Adoptions Pacific Rim Adoptions

The impact of European law on customary adoption practices in Aotearoa.¹

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Introduction

Since New Zealand was colonised by English settlers more than two hundred years ago, the impact on Maori, as the indigenous people, has been immense and all encompassing. Laws the English imported and adopted have effectively subjugated most Maori customary practices. This can clearly be seen in the customary practice of *whangai*,² a hybrid of the European practices of adoption and fostering.

Although English law has similarly impacted on customary adoption in other Pacific nations, there is a dearth of information about those practices. However, it is generally accepted they bear a strong resemblance to the practice of *whangai* in New Zealand. Therefore this paper will focus on the issue of adoption in New Zealand. It will outline the relevant European laws and explain the concept of customary adoption and discuss the contrast between those concepts. It will suggest that many of the *whangai* concepts are more beneficial than European concepts in terms of their effect on those involved in the adoption 'triangle'.

¹ The Maori name for New Zealand. Literally translated, it means 'land of the long white cloud', a reference to how the island appeared to the first Maori to migrate to New Zealand.

² Also known as *atawhai* in the Tai Tokerau tribe and *taurima* in the Taranaki tribe.

Background Issues

Any discussion regarding the impact of colonial law on aspects of customary Maori practices must be viewed within the context of the Treaty of Waitangi, which is widely regarded as the founding document of New Zealand.³ The true interpretation of the Treaty is the subject of ongoing and contentious debate in respect of a number of issues relevant to this paper.

(i) Sovereignty v Governorship

Article 1 of the English version of the Treaty states as follows:

*'The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of **Sovereignty** which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess, over their respective Territories as the sole Sovereigns thereof.'* [emphasis added]

However, the Maori version of the same Article states as follows:

*'Ko nga Rangatira o te wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu--te **Kawanatanga** katoa o ratou wenua.'* [emphasis added]

The difference between the English term 'sovereignty' and the Maori word *kawanatanga* is significant. The literal translation of *kawanatanga* is 'governorship' whereas the translation of 'sovereignty' is *rangatiratanga*. Clearly, these terms describe significant different levels of power. Since the Treaty was signed, Maori have consistently denied their forefather signatories to the Treaty intended to cede sovereignty to Queen Victoria, as the concept of collective ownership which is fundamental to Maori society meant it was not theirs to cede.

This assertion is arguably supported by the assurance given in Article 3 (Maori version) of the Treaty whereby the Queen of England confirmed and guaranteed to the Chiefs and Tribes of New Zealand and to their respective families and individuals, *tino*⁴ *rangatiratanga* over

³ For further information on the Treaty of Waitangi 1840, including a hyperlink to the full text and an explanation of its terms, see www.archives.govt.nz/holdings/treaty_frame.html. Also see www.teachingonline.org/WebThingsMaori.html for an online English/Maori dictionary

⁴ 'tino' is an intensifier, akin to the term 'quintessential'

their lands and estates, forests, fisheries and taonga which they collectively or individually possessed.

In summary, Maori contend that while their tipuna ceded governorship, or trusteeship to the Queen, they retained absolute sovereignty over all their lands, estates, forests, fisheries and taonga, including children. Therefore, Maori have retained the right to determine all issues relating to their children, including the issues of adoption and fostering, or whangai. The concept of children as taonga is clearly explained by Dame Joan Metge:

In Maori thinking, children are not the exclusive possession of their parents. Indeed the ideas of possession and exclusion, separately and in association, outrage Maori sensibilities. Children belong to the whanau (and beyond that to the hapu and iwi) as members, not as possessions. They are taonga, highly valued 'treasures' held collectively and in trust for future generations. In whanau which are functioning as they ought, parents are expected and expect to share the care and control of their children with other whanau members. Sometimes, especially with the eldest, this means relinquishing their daily care, for a short or long period, to a grandparent or other relative. Generally it means that other whanau members carry out the same functions as parents do, as occasion arises and in their presence as well as their absence.

The concept of whangai

Whangai is a term which describes both the practice, and the child who is the subject of that practice. A *whangai* relationship is an informal and open fostering or guardianship arrangement between a child and a member of that child's *whanau*. There are no particular formalities and the arrangement is a matter of public knowledge. The child who is the *whangai* is effectively given by the birth parent or parents to be raised by another member of the *whanau*. The arrangement is open and fluid and the *whangai* grows up fully informed as to the identity of his birth parents, and 'foster' parents. The role and status of the birth parents is not displaced by the arrangement. The *whangai* usually has ongoing and sometimes daily contact with his ¹⁰ birth parents and other members of the *whanau* who all share in

5 "taonga" refers to all dimensions of a tribal group's estate, material and non-material - heirlooms and wahi tapu (sacred places), ancestral lore and whakapapa (genealogies), etc. [source: www.govt.nz/aboutnz/treaty.php3] The term includes children, which is significant in terms of adoption issues, as this paper will later explain.

6 forefathers, ancestors

7 Metge, 'Ko Te Wero Maori - the Maori Challenge' in Family Court, Ten Years on (New Zealand Law Society, 1991) at 24 - 25

8 the extended family. A collective group which can include several generations. The rights and powers of individuals are subsumed under common interests and goals.

9 in this context the word means foster child

his care. The *whangai* sometimes returns to his birth parents for extended periods of time, or on a permanent basis if, for example the care-giving grandparent dies.

Unlike the European concept of a nuclear family, the Maori concept of *whanau* embraces and involves all extended family members in this manner. This is a feature of many Pacific Island cultures where extended family members, particularly older generations, are a valuable source of *whakapapa*¹¹, *whanaungatanga*¹² and *tikanga*¹³, which is traditionally transmitted orally from one generation to another.

In pre-European and, to an extent, post-colonisation times, a *whangai* might be arranged to cement relationships between *whanau*, *hapu*¹⁴ or *iwi*¹⁵, to ensure land rights were consolidated within a tribe, rather than being diluted. In present day society a *whangai* might be arranged for a number of reasons including the following;

- To provide an infertile couple with a baby
- To comfort lonely grandparents or older relatives whose children have left home
- To ease pressure on birth parents and enable them to seek employment or further education which, in turn, benefits the household economically
- To relieve a single mother of the burden, if not the stigma, of single parenthood

The benefits to the *whangai* include the following:

- A complete understanding of his place in the world
- Knowledge of *whakapapa*, *whanaungatanga* and *tikanga*
- Where the *whangai* is provided to a lonely or childless relative, a sense of having a special and treasured role in the *whanau*

The *matua whangai*¹⁶ who 'adopts' the *whangai* may be offered the privilege of naming the child. However, unless the *matua whangai* obtains a custody order¹⁷, adoption order¹⁸, is appointed as a

10 for the sake of simplicity, the pronouns 'he' and 'his' are utilised in this paper instead of the more wordy 'he or she, his or hers'

11 genealogical information

12 historical and cultural information about *whanau*, *hapu* and *iwi*

13 a comprehensive term encompassing all things Maori including attitudes, beliefs, conventions, customary practices, practices, principles, procedures, protocols, rules. Definitions taken from www.teachingonline.org/WebThingsMaori.html

14 sub-tribe

15 tribe

16 'matua' loosely translated means 'parent'

guardian¹⁹ or is accorded legal status by direction of a Judge in wardship proceedings, the birth parent retains all parental rights and responsibilities.

The legal status of a *whangai*

Since 1932, *whangai* have not been recognised as having legal status²⁰ except for the purposes of succession to Maori land²¹. Between 1899 and 1902, *whangai* were accorded legal recognition. From 1902 to 1909, the *whangai* arrangement could be recorded at the Native Land Court. Between 1927 and 1931, *whangai* again received legal recognition. At all intervening times, no such recognition was given. After 1909, Maori who wished to adopt had to do so in accordance with provisions in the Native Land Act 1909.

Legal adoption in New Zealand

NZ has the highest incidence of adoption in the Western world as 3.2 % of the New Zealand population is adopted. In addition, 16% of New Zealanders are involved in an adoption triangle as an adoptee, birth parent or adoptive parent. If grandparents, siblings and other relatives are included, the number of persons directly and indirectly affected by an adoption is significant²³.

When New Zealand introduced a system of legal adoption in 1881, it was the first commonwealth country to do so. Like most New Zealand laws, the Adoption Act 1955 is based on English common law. It emphasises the English concept of the nuclear family, whereby persons other than a child's biological parents are seen as substitute parents. This is in direct contrast with the Maori concept of the whanau sharing responsibility for the care of children.

It has been suggested that, historically, adoption has sought to fulfil a number of purposes:²⁴

- a means of unpaid domestic, farm labouring or other help in the home, farm or business

17 pursuant to s11(1)(b) Guardianship Act 1968 or s101(1)(e) Children, Young Persons and Their Families Act 1989

18 Adoption Act 1955

19 s8(1) Guardianship Act 1968

20 s19(2) Adoption Act 1955

21 Section 3 Te Ture Whenua Maori Act 1993 defines a *whangai* as 'a person adopted in accordance with tikanga Maori'. The Maori Land court may make a factual determination as to whether or not a person is a *whangai*. Expert evidence may be called from respected members of the iwi, in making that determination.

22 NZ Official Yearbook, Wellington, Department of Statistics, 1956, p74

23 Brookers Family Law Service

24 KC Griffiths, New Zealand Adoption: History and Practice, Social and Legal 1840 -1996, Wellington, 1997, pp19 - 21

- reducing costs to the public purse of caring for children who have lost support of their parents or have been abandoned or neglected
- giving a child a fresh, unblemished, new family identity
- relieving married couples of the embarrassment and lack of personal fulfilment resulting from infertility
- attempting to hold together a failing marriage
- exercising control over the make-up of a family
- relieving a child of the social and legal disadvantages of illegitimacy
- relieving an unmarried mother and her family of the shame and stigma of having given birth outside marriage
- reducing the incidence of abortion
- providing committed carers to children with special needs
- providing greater security or permanency to non-parental carers and children in out-of-family care
- obtaining a child without the health risks or disadvantages of pregnancy and childbirth and/or without increasing global overcrowding
- providing for the needs of an 'unwanted' child or rescuing third world or underprivileged children from their situations
- securing permanent residence in New Zealand or immigration status for a child
- helping a child who would not otherwise have a family to benefit from the love, care, protection and security of a permanent nurturing relationship

The process of adoption

(i) Any person, whether domiciled in New Zealand or not, may apply to the Court²⁵ for an adoption order in respect of any child, whether or not that child is domiciled in New Zealand.²⁶

(ii) Unless there are special circumstances, the applicant or, in the case of a joint application, one of the applicants must be at least 25 years of age, and at least 20 years older than the child, or; if the applicant is a relative of the child, must be 20 years of age, or; the mother or father of the child.²⁷

²⁵ this includes the Family Court, or a District Court of civil jurisdiction; and includes the High Court acting in its jurisdiction on appeal under this Act, s2 Adoption Act 1955

²⁶ supra, s3

²⁷ supra, s4

(iii) The following persons must give their consent to the adoption, before the Court makes any interim order or adoption order;²⁸

- The parents and guardians of the child²⁹
- The spouse of the applicant in any case where either a husband or wife makes the application alone.³⁰

(iv) If the Court considers the application to adopt should be granted, it may make an interim order in favour of the applicant or applicants.³¹ However, this step may be bypassed if all the conditions of the Act governing the making of an interim order have been complied with and there are special circumstances, which render it desirable that an adoption order should be made in the first instance.³²

(v) Before making any interim or adoption order, the Court shall be satisfied the applicants are fit and proper persons to have custody of the child and of sufficient ability to bring up, maintain and educate the child; that the welfare and interests of the child will be promoted by the adoption; that any condition imposed by any parent or guardian of the child with respect to the religious denomination and practice of the applicants or as to the religious denomination in which the applicants intend to bring up the child is being complied with³³.

(vi) After an interim order has been in force for six months³⁴, the applicants may apply to the Court for an adoption order to be issued. If the child is under 15 years of age, the applicants must have cared for the child continuously for not less than 6 months since the adoption was first approved by a Social Worker, or the interim order was made, which first occurred.³⁵

28 The Court may dispense with the consent of any parent or guardian to the adoption of a child for a number of reasons. For example, where the Court is satisfied the parent or guardian has abandoned, neglected, persistently failed to maintain, or persistently ill-treated the child, or failed to exercise the normal duty and care of parenthood in respect of the child; or where the Court is satisfied the parent or guardian is unfit, by reason of any physical or mental incapacity, to have the care and control of the child, unless that unfitness is likely to continue indefinitely - supra, s8(1)(a)

& (b)

29 supra, s7(2)(a)

30 supra, s7(2)(b)

31 supra, s5

32 supra, s5(a) & (b)

33 supra, s11

34 or, where there are special circumstances, after a shorter period specified by the Court - supra s13(2) & (2A)

35 supra, s13(a) & (b)

(vii) A right of appeal to the High Court exists where the Court has refused to make an interim or adoption order.³⁶

(viii) When the adoption order is made, the child is deemed to be the child of the adoptive parent or parents and ceases to be the child of the existing parents. The child's relationships with all other persons, including extended family members is changed accordingly.³⁷

(ix) Any person, whether or not they are Maori, may apply to adopt a Maori child.³⁸

(x) Adoptions according to Maori custom have no force or effect in respect of intestate succession to Maori land or otherwise.³⁹

A clash of concepts and cultures

The concept of severing genealogical links with the *whanau* of a child is anathema to the concept of *whakapapa*, which is central to Maori society. In 1999 the Law Commission produced a report, following a series of hui during which it consulted with Maori on the issues relating to adoption. That report listed a number of aspects on the topic which concern Maori, including;

(i) The Adoption Act interferes with *whakapapa* or customary Maori lines of descent in that it severs the child's legal connection with the biological parents and creates artificial parenthood in favour of the adoptive parents.

(ii) The secrecy and rigidity that characterises many adoptions goes against Maori values of openness and flexibility in family arrangements.

(iii) A child adopted outside the *whanau* may lose his or her cultural and/or tribal identity and may lose opportunities such as the right to enrol on the Maori electoral roll, the right of entitlement to Maori land, and the right to access scholarships available within the *iwi*.

³⁶ *supra*, s13A

³⁷ *supra*, s16

³⁸ *supra*, s18

³⁹ *supra*, s19

⁴⁰ meetings

⁴¹ Adoption: Options for Reform, NZLC PP38, October 1999, para 39

- (i) Adoption laws do not require consultation with members of the birth parents' *whanau* or ensure that *whanau* members have a pre-emptive right to care for the child.
- (ii) The Adoption Act 1955 breaches the Treaty of Waitangi in that it denies Maori full and exclusive control of their *taonga* .

Severance of *whakapapa*

In Maori terms, the importance of *whakapapa* is central and fundamental to each individual . Therefore, the concept of *whakapapa* should be the starting point in the application of any statutory provisions.

This was recognised in *Re Baby C* ⁴² , where a Maori father applied for guardianship and custody orders. The mother had placed the child for adoption and the child was living with the proposed adoptive parents. His parents who stressed the importance of maintaining the child's links with her Maori heritage supported the father's application. His Honour, Judge Inglis QC acknowledged the grandparent's claim stemmed from a deep sense of acceptance, obligation and *aroha* and that the child's *whanau* were part of her family, blood line and physical and spiritual history.

Secrecy and rigidity

The legalistic notion of children as personal property reflects the patriarchal and authoritarian concepts of Victorian society where children are viewed as possessions and subject to the absolute control and authority of their parents. The secrecy and rigidity of adoption laws ensures that control and authority is secured.

There is a growing movement, not exclusive to Maori which supports the idea of open adoption. This would reflect most other civil laws governing human relationships which lean towards openness and flexibility.

On the other hand, it could be argued the open intrafamily 'adoption' of a *whangai* arrangement creates confusion for the child. For example, where grandparents receive a *whangai* and raise him as their own child, the status of all other family members in relation to that child are altered, in a way that negatively impacts upon the child. The grandparents

42 [1996] NZFLR 280

become parents, the aunts and uncles become cousins, the mother becomes a sister, and siblings become nephews and nieces. However, the openness of the arrangement would arguably counter confusion as the child is raised from birth with an understanding of their place in the family.

Secrecy impacts upon a child's well being by disconnecting them from their *whakapapa*. They lose their identity, sense of belonging, history, connection to land, extended family and ancestors and knowledge of their place in the world.

Where a Maori child is cross-culturally adopted, he or she may suffer from a feeling of not belonging as he does not have the physical appearance of either race. The child does not feel 'white' enough for one community, and yet, when faced with his or her own culture, feels embarrassed at the lack of knowledge and inability to participate in that culture.

Loss of cultural and tribal identity

The sense of a loss of identity is an issue which is not exclusive to Maori adoptees. As individuals, adopted children of all races have a right to know about their biological parentage and the circumstances of their birth.

This right is affirmed in the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally which states at Article 9:

‘The need of a foster or an adopted child to know about his or her background should be recognised by persons responsible for the child's care unless this is contrary to the child's best interests.’

This issue has been recognised by the Courts. In *Application by C*⁴⁶ a European couple sought to adopt a Maori child. The couple knew almost nothing of Maori culture and had little interest in it. The adoption was opposed by some members of the *whanau* and by the Department of Social Welfare. The Judge held that although the applicants were fit and proper people to care

43 love

44 Submission 1/56 to the Law Commission: Adoption and Its Alternatives: A Different Approach and a New Framework, NZLC R65, September 2000

45 Adopted by the General Assembly of the United Nations, see Resolution 41/85 of 3 December 1986, Annexure A14.

for the child, in cultural terms, the welfare and interests of the child would not be promoted by the adoption.

It has been widely accepted by the Courts that it is desirable a child should be raised by members of his own cultural or racial group.⁴⁷ If this is not possible, the child should have access to information about and opportunities to participate in their cultural and language of origin.

Lack of consultation with *whanau*

In Maori society, the wider *whanau* have the right to be heard on cases involving placement of Maori children. Such decisions should not be made solely in accordance with western priorities, and Maori communities should be permitted to care for their own children in the best way they can.⁴⁸

In a recent report, the Law Commission reviewed Maori customary adoption practices and recommended that, where practicable, children should be placed within a family of their own culture. If this was impracticable, the Court should satisfy itself the applicants would foster the child's cultural, social, economic and linguistic heritage and facilitate contact with the child's family.⁴⁹ Although the Commission did not go so far as to recommend compulsory family group meetings, it recommended such meetings as a way of helping families to find solutions that best meet the needs of the child and family.⁵⁰

In *B v M* (1996) 14 FRNZ, the High Court acknowledged the view of *whanau* is important and should, whenever possible, be ascertained in traditional ways. However, in that case the Court refused to interfere with the birth mother's desire to have her child placed outside the *whanau*. The Court accepted the submission that in Maori communities, as in other communities, there are dysfunctional *whanau* where circumstances prevent them from providing desirable nurture.

46 [1990] NZFLR 280

47 For example, the case of *T v F* (1996) 14 FRNZ 415 where Maori grandparents sought to stop a European couple adopting their grandchild. The grandparents sought to be appointed as additional guardians or to be awarded custody to preserve the child's cultural and spiritual heritage.

48 A view adopted by the Adoption Practices Review Committee in their report to the Minister of Social Welfare, August 1990, where it submitted at p11: 'New Zealand is a bicultural country and different cultural perspectives, especially those of the tangata whenua must be incorporated into adoption practices. The Treaty of Waitangi and Puao-te-ata-tu are the foundation documents.'

49 *Adoption and Its Alternatives: A Different Approach and a New Framework*, NZLC R65, September 2000, paras 175 to 182.

50 *supra*, paras 218 to 221

The Court held the birth mother had a statutory entitlement to consent to the adoption, without reference to the whanau.

Breach of the Treaty of Waitangi

There are at least two claims currently before the Waitangi Tribunal⁵¹ which allege the Adoption Act 1955 breaches the Crown's obligation to Maori as a Treaty partner.⁵² The claims relate to Article 2 of the Treaty which guarantees Maori full and exclusive control over their *taonga*.

In *B v DGSW*⁵³ the grandmother of a Maori child applied for custody and guardianship of the child, claiming she wanted to protect the child's indigenous rights to be raised and nurtured by her *whanau*, *hapu* and *iwi*. B's daughter had given her consent to a closed adoption arrangement where the prospective adoptive parents were of a different Maori *iwi*. B argued the Treaty of Waitangi was binding on the Family Court and the courts should recognise the constitutional status of Maori as New Zealand's first people. This included the right to manage their own affairs, subject to such limitations as are necessary for the proper operation of the State. Children, as *taonga* were valued treasures, held collectively in trust for future generations.

The High Court accepted the grandmother's submission the Treaty should apply generally and colour all relevant public and private matters. Further, the Treaty has a direct bearing on the interpretation of statutes, whether or not it is specifically referred to in a statute. The Court accepted the cultural background of the child was significant and should be kept foremost in the mind of persons charged with making decision on that child's future.

In summary

Maori are effectively faced with two problems in relation to adoption. First, their own cultural practice of adoption has no legal recognition and, secondly, there is a risk of children being lost to the *whanau*, *hapu* and *iwi* into which the child was born. In respect of the latter problem, the loss goes both ways as the child has much to lose in terms of identity, culture, *tikanga* and *whakapapa*.

51 a judicial body which makes determinations regarding claims by Maori pursuant to the Treaty of Waitangi

52 Wai 160 & Wai 286

53 (1997) 15 FRNZ 501, also reported as *BP v DGSW* [1997] NZFLR 642; for the appeal against the Family

In keeping with a move towards open adoption practices, it is suggested much could be learned from the experience of *whangai* arrangements. The devastation and confusion suffered by adoptees in closed adoptions who, sometimes unsuccessfully, seek their birth families and parents, would be avoided through the practice of open adoption along the lines of *whangai* practice.

Whether or not *whangai* should be given legal status is debatable. However, the fact *whangai* have no legal status can lead to severe injustices. Take for example, the situation faced by a child who has been raised from infancy to adulthood by a grandparent. If the grandparent dies intestate, the *whangai* is not entitled by law to a share of the estate, as he would have been, had his adoption been legalised. Although customary adoption has no legal standing in New Zealand, it is a common and widespread practice amongst Maori families who, for many reasons, do not take steps to legalise the arrangement.

If Maori were free to practice *whangai* adoptions with those arrangements being given legal status, the intervention of legislation might be inevitable. However, because *whangai* is a customary practice, it is questionable whether it would be appropriate to regulate it by statute. It could be argued that changes to a customary practice should occur only in response to cultural forces, rather than legislative ones. The danger of legal intervention is the potential for distortion, through codification and freezing, of the term *whangai*, along with the potential for limiting the evolution of the practice itself. Perhaps the better approach would be to simply repeal sections 18 and 19 of the Adoption Act 1955 and simply allow Maori to practise *whangai* as a customary practice. This would be in keeping with the assurances given to Maori pursuant to the Treaty of Waitangi and their unique status as the *tangata whenua* of New Zealand.

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