TE RITO O TE HARAKEKE: DECOLONISING CHILD PROTECTION LAW IN AOTEAROA NEW ZEALAND

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It is now firmly established that the overrepresentation of tamariki Māori within the Aotearoa New Zealand child protection system is largely a consequence of colonisation. However, at least as far as the Crown is concerned, the contention that decolonisation is a necessary step in reversing those trends remains a more controversial issue. Drawing on my doctoral research into this topic, this article argues that the child protection system must be decolonised, and that efforts towards reform which do not prioritise decolonisation are likely to perpetuate long-standing harms. The article has four goals. First, I examine why decolonisation provides the best framework through which to enact child protection system reform. Secondly, I identify three overarching themes within the current legal framework, but argue that the presence of these themes does not mean they are all given equal weight. Thirdly, I outline a theory of reform I have termed "kaupapa Māori legal theory", which seeks to enable legislative change based on tikanga Māori in a way which pays heed to the risks of doing so from a Māori perspective. Finally, I apply that theory to child protection law, identifying six tikanga principles which could provide the basis of a decolonised system: mana, rangatiratanga, wānanga, whānau, whakapapa and whanaungatanga.

I INTRODUCTION

It is now firmly established that the overrepresentation of tamariki Māori within the Aotearoa New Zealand child protection system is largely a consequence of colonisation. Successive reviews of the system[1] have described the impacts of colonisation, with the Crown officially acknowledging

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1 Office of the Children's Commissioner *Te Kuku O Te Manawa – Moe ararā! Haumanutia ngā moemoeā a ngā tūpuna mō te oranga o ngā tamariki* (November 2020); Waitangi Tribunal *He Pāharakeke, he Rito Whakakīkīnga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021); and Whānau Ora Commissioning Agency *Ko te wā whakawhiti: It's time for change – a Māori inquiry into Oranga Tamariki* (February 2020).

those impacts in 2020.[2] The devastating impacts that colonisation had, and continues to have, on tamariki and whānau Māori have finally been widely recognised.

Given those impacts, this article contends that, if the child protection system is a product of colonisation, it follows that the system requires decolonisation if outcomes for Māori are ever to be improved. To date, this has remained a more controversial contention. While several Māori advocates have called for the replacement of Oranga Tamariki with a Māori alternative, these calls have so far been resisted.[3] This is perhaps in part because such an exercise contains a number of risks. Particularly regarding law reform, scholars have warned that the incorporation of tikanga Māori into law brings with it a risk that such concepts become co-opted by the state.[4] The debate over whether the law can be a tool of decolonisation is a long-standing one.[5]

This article aims to add to that debate by suggesting a framework for the decolonisation of the child protection system. The article has four key objectives. First, I argue that the concept of decolonisation provides the best framework through which fundamental change to the child protection system can be implemented. The term "decolonisation" helps to emphasise that not only must reform involve devolution of child protection functions to Māori, but it also requires a fundamental re-envisioning of those functions. Colonisation did not just involve the seizure of Māori land: it also involved the subjugation of Māori ideas. The restoration of those ideas is central to decolonisation in any context, and child protection reform is no exception.

Secondly, I analyse the legal framework which shapes the current child protection system, identifying three overarching themes within that framework: well-being, cultural identity and participation in decision-making. The presence of these three themes demonstrates that each is important within the current legal framework, but this does not guarantee that they are given equal weight. We cannot assume that our current child protection framework pays sufficient attention to the needs of tamariki Māori just because those needs are mentioned in the law.

Thirdly, I outline ways in which the child protection system could be decolonised, bearing in mind the risks of such an exercise described above. I propose a framework for addressing such risks, which I have labelled "kaupapa Māori legal theory", as a tool for bringing together existing approaches to decolonisation, law and kaupapa Māori research. This recognises that, from a Māori perspective, child

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2 Waitangi Tribunal, above n 1.

3 Office of the Children's Commissioner, above n 1; and Whānau Ora Commissioning Agency, above n 1.

4 Ani Mikaere *Colonising Myths – Māori Realities: He Rukuruku Whakaaro* (Huia Publishers and Te Wānanga o Raukawa, Wellington, 2011); Annette Sykes "The Myth of Tikanga in the Pākehā Law" (Nin Thomas Memorial Lecture, University of Auckland, 5 December 2020); Amohia Boulton and others "E tipu E rea: the care and protection of indigenous (Māori) children" [2018] NZLJ 3; and Tania Williams and others *Care and protection of tamariki Māori in the family court system* (Ngā Pae o te Māramatanga, May 2019).

5 See for example Sykes, above n 4.

protection reform is part of a broader project: that of recognising and upholding Māori claims to rangatiratanga.[6] I discuss the possibility of applying kaupapa Māori legal theory more broadly, not just in relation to child protection.

Finally, I identify six tikanga principles, drawn from my PhD research on this topic, which I believe could form the foundation of a decolonised child protection system: mana, rangatiratanga, wānanga, whānau, whakapapa and whanaungatanga.[7] From this framework, detailed proposals for the reform of law, policy and practice could be developed. Some of those proposals are described further, such as the disestablishment of family group conferences (FGCs) in favour of what I have termed "child protection wānanga". However, for the most part, the intent of this article is not to prescribe the detail of wholesale system reform, but rather to outline what would be required to effect such a fundamental change.

The history of child protection reform in Aotearoa New Zealand, at least in the last 30 years, has often been one of incrementalism without sufficient attention to the bigger picture. Too often a choice is presented between incremental change and radical transformation. I believe this is a false dichotomy: we can, and must, prioritise both. This article argues that the tikanga principles of mana, rangatiratanga, wānanga, whānau, whakapapa and whanaungatanga, applied through the lens of kaupapa Māori legal theory, may provide a way to do that.

II DECOLONISATION AS A FRAMEWORK FOR REFORM

A Understanding Colonisation

Aotearoa New Zealand's child protection system removes more Māori children from their birth families than any other ethnicity.[8] In 2021, the Waitangi Tribunal conducted an urgent inquiry into the child protection system, and the findings from that inquiry were damning.[9] Among other things, the Tribunal found that Oranga Tamariki (and its predecessor agencies) had breached several of the principles of the Treaty of Waitangi/Te Tiriti o Waitangi,[10] and that the disparities in the child

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6 The terms "rangatiratanga" and "tino rangatiratanga" are used throughout this article. The latter is primarily used in reference to the guarantee of tino rangatiratanga contained within Te Tiriti o Waitangi, while the use of the former acknowledges that the concept of rangatiratanga predates the signing of Te Tiriti and is broader than the definition of the term as it is used within that context.

7 Luke Fitzmaurice "Te Rito o Te Harakeke: Decolonising Child Protection and Children's Participation" (PhD Thesis, University of Otago, 2022).

8 Paula Rebstock and others *Expert Panel Final Report: Investing in New Zealand's Children and their Families* (Ministry of Social Development, December 2015).

9 Waitangi Tribunal, above n 1.

10 This article generally refers to "Te Tiriti o Waitangi" rather than "The Treaty of Waitangi" in recognition of the fact that the te reo Māori version of the document is the one which the vast majority of Māori signatories signed. "The principles of the Treaty of Waitangi/Te Tiriti o Waitangi" or "The principles of the Treaty/Te

protection system between Māori and non-Māori children were a consequence of those breaches.[11] During the Tribunal hearings, the Crown acknowledged that the negative outcomes faced by tamariki Māori within the child protection system were, at least in part, a result of colonisation.

Some of the reasons for those negative outcomes can be explained by looking at the system itself,[12] but truly understanding the source of these issues requires an examination of the broader context of colonisation. The arrival of European settlers in Aotearoa, and the subsequent events that unfolded, eventually led to a breakdown of traditional cultural practices for Māori.[13] The loss of those practices continues to affect Māori today, with family violence and child protection issues within Māori whānau being just one of the many ongoing impacts of colonisation.[14] Prior to the arrival of Europeans, Māori society was governed by a system of values, laws and customs known as tikanga.[15] Tikanga remains relevant today, and it is important to note that tikanga continues to be practised by many whānau, but in precolonial times its importance as a foundational framework across all of Aotearoa was unparalleled.

Three key tikanga concepts are particularly important to understand in a child protection context: whanaungatanga, whakapapa and whānau. Whanaungatanga can be translated as "relationships"[16] but this does not capture the significance of whanaungatanga within Māori society. Williams contends whanaungatanga was perhaps the most important principle of all in early Māori society, and continues to be so today.[17] Whanaungatanga described the centrality of kinship within Māori society; it has

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Tiriti" are referred to where these are specifically relevant (in reference to Waitangi Tribunal proceedings, for example, which are based on the principles).

11 Waitangi Tribunal, above n 1.

12 Boulton and others, above n 4; and Williams and others, above n 4.

13 Erana Cooper and Julie Wharewara-Mika "Healing, Towards an Understanding of Māori Child Maltreatment" in Tracey McIntosh and Malcolm Mulholland (eds) *Māori and Social Issues* (Huia Publishers, Wellington, 2011) 169.

14 Rawiri Taonui "Trends in Māori Child Abuse and Homicide" in Selwyn Katene and Malcolm Mulholland (eds) *Future Challenges for Māori: He Korero Anamata* (Huia Publishers, Wellington, 2013) 155; and Cooper and Wharewara-Mika, above n 13.

15 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (revised ed, Huia Publishers, Wellington, 2016); Jacinta Ruru "First Laws: Tikanga Māori in/and the law" (2018) 49 VUWLR 211; and Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai LR 1.

16 Mead, above n 15.

17 Williams, above n 15.

been labelled as "the glue that held, and still holds, the system together".[18] Whanaungatanga governed human relationships with one another, with the physical environment and with the spiritual world.

Related to whanaungatanga is the principle of whakapapa. Whakapapa can be translated as "genealogy",[19] but again, this translation may understate the significance of the principle to Māori. Whakapapa describes the relationships a person has with others and with their ancestors. It is the basis of an individual's rights, inheritances, obligations to others and their place in Māori society.[20] Whakapapa extends beyond relationships between humans; Durie notes that whakapapa also describes human relationships with the non-human world, including fish, animals, plants and atua (deities).[21]

Also relevant is the concept of whānau. The whānau has been described as "[t]he basic social unit in Maori society",[22] and as the concept "which underpins the whole social system".[23] Although in modern times whānau has often been used as a synonym for family, traditional understandings of whānau were wider than that.[24] The traditional Māori whānau was "a group of relatives defined by reference to a recent ancestor, comprising several generations, several nuclear families and several households, and having a degree of ongoing corporate life".[25] The whānau was far broader than the nuclear family.[26] This is not to suggest that non-Māori family structures have ever been strictly limited to nuclear families, but it is important to acknowledge the unique composition and role of whānau for Māori. Prior to colonisation there were often particular roles for grandparents, including sharing in decision-making regarding children,[27] and teaching them about their whakapapa.[28] In

18 At 4.

19 Mead, above n 15.

20 Mead, above n 15.

21 Eddie Durie "Ancestral Laws of Māori" in Danny Keenan (ed) *Huia Histories of Māori: Ngā Tāhuhu Kōrero* (Huia Publishers, Wellington, 2012) 1.

22 Ranginui Walker *Ka Whawhai Tonu Matou: Struggle Without End* (2nd ed, Penguin, Auckland, 2004) at 63.

23 Mead, above n 15, at 166.

24 Mason Durie and others *Whānau Ora: Report of the Taskforce on Whānau-Centred Initiatives* (Te Puni Kokiri, 2010).

25 Jacinta Ruru "Kua tutū te puehu, kia mau: Māori aspirations and family law policy" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 59.

26 Joan Metge *New growth from old: the whānau in the modern world* (Victoria University Press, Wellington, 1995); and Ruru, above n 25, at 59.

27 Metge, above n 26.

28 Kuni Jenkins and Helen Mountain-Harte *Traditional Maori Parenting: An Historical Review of Literature of Traditional Maori Child Rearing Practices in Pre-European Times* (Te Kahui Mana Ririki, Auckland, 2011).

modern times, whānau are more likely to be comprised of multiple households which function in co-operation, but this does not mean that traditional understandings of whānau are resigned to the past.[29]

When Europeans arrived their laws were fundamentally different to the laws that governed Māori society.[30] Whanaungatanga and whakapapa as foundational societal principles were removed, and contract, rather than kinship, became the defining paradigm for legal relationships.[31] The British family structure was entrenched by policy-makers, and eventually became accepted as the norm.[32] The alienation and seizure of Māori land throughout the 19th century undercut the economic base of whānau, which, in turn, led to a decline in Māori health.[33] The breakdown of whānau structures "ruptured the sacredness of relationships between men and women and destroyed the nurturing protective environments required for child-rearing".[34] In the 20th century, whānau structures were further fragmented through urbanisation. Within a generation, the majority of Māori went from living in their traditional tribal areas to living in major towns and cities.[35] This further distanced Māori from their whakapapa and contributed to a loss of identity and social cohesion.[36] This was a part of the effort by successive governments "aimed at making Māori abandon their distinctive tikanga and conform to the economic and social patterns of the non-Māori majority".[37]

The impact of colonisation on the tikanga of whanaungatanga, whakapapa and whānau lay not just in the loss of material resources, but the loss of these Māori ways of being.[38] Smith describes this as "the reach of imperialism into 'our heads'".[39] There were specific aspects of this process which related to child protection, driven by an assumption that the British family structure was superior. Cox argues that the early child protection system in Aotearoa New Zealand played a crucial part in the

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29 Ruru, above n 25.

30 Williams, above n 15.

31 Williams, above n 15.

32 Metge, above n 26.

33 Rebecca Wirihana and Cherryl Smith "Historical trauma, healing and well-being in Māori communities" in Cherryl Smith and Rawiri Tinirau (eds) *He Rau Murimuri Aroha: Wāhine Māori insights into historical trauma and healing* (Te Atawhai o te Ao, Whanganui, 2019) 3; and Metge, above n 26.

34 Wirihana and Smith, above n 33, at 5.

35 Paul Meredith "Urban Māori" (8 February 2005) Te Ara – The Encyclopaedia of New Zealand <www.teara.govt.nz>.

36 Wirihana and Smith, above n 33.

37 Ruru, above n 25, at 65.

38 Luke Fitzmaurice "Whānau, Tikanga and Tino Rangatiratanga: What is at stake in the debate over the Ministry for Children?" (2020) 9 MAI Journal 166.

39 Linda Tuhiwai Smith *Decolonising methodologies: research and indigenous peoples* (3rd ed, Zed Books, London, 2021) at 25.

process of Māori assimilation.[40] Walker states that "although colonisation was driven by economic factors, which impelled imperial powers to expropriate the land and resources of indigenous people, its implementation was underpinned by cultural superiority".[41] The imposition of colonial ideas, and the assertion that they are inherently superior to Indigenous ones, was a precondition for the physical dispossession which colonisation also involved. As one group of authors have described it, "[i]n order to justify their use of violence, the colonisers objectified Māori people and dismissed their practices as primitive, inferior, unintelligent, ignorant, uncivilised, violent, inhumane, and degrading to women."[42] Those authors argue that "[i]t was only after applying this subjugating discourse and their overwhelming force that Pākehā people were able to seize control."[43] Colonisation involved the "systematic fragmentation" of Māori ways of thinking, feeling and interacting with the world.[44] According to Mikaere:[45]

> … colonisation has always been about much more than simply the theft of land, the decimation of an Indigenous population by introduced disease and the seizure of political power. It has always been about recreating the colonised in the image of the coloniser.

B Imagining Decolonisation

Before proceeding further, it is worth defining what is meant by "decolonisation", as the term can have different meanings in different contexts and has often been contested. I have found it useful to draw on the definition provided within the book *Imagining Decolonisation*, in which the authors state that:[46]

> A broad definition of colonisation is that it's a process of one group imposing their ideas about the world on another group, taking away the things that make life possible and good; and that decolonisation is the process of removing those impositions.

This definition, although broad, provides a starting point for discussions about decolonisation, which can then take on further depth depending on the particular context. Put another way, colonisation is about the subjugation of indigenous ideas, and decolonisation is about the reassertion of those ideas

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40 Kendra Cox "The cruel pattern: Early child care and protection and the imposition of settler colonial capitalism in Aotearoa" (MSW Thesis, University of Auckland, 2021).

41 Walker, above n 22, at 146.

42 Mike Ross "The throat of Parata" in Bianca Elkington and others *Imagining Decolonisation* (Bridget Williams Books, Wellington, 2020) 21 at 30.

43 Ross, above n 42, at 30.

44 Smith, above n 39, at 31.

45 Mikaere, above n 4, at 206.

46 Bianca Elkington and others *Imagining Decolonisation* (Bridget Williams Books, Wellington, 2020) at viii.

as valid. This is not to diminish the importance of the material aspects of decolonisation, which are essential, but in this context the epistemological aspects of decolonisation are just as important and are often overlooked.

Comments from Moana Jackson in 2021 place this definition within the current context. At the launch of the book *Imagining Decolonisation,* Jackson noted the recent trend within government policy initiatives towards the provision of "by Māori, for Māori" social services. "There is a certain positive advance to that", Jackson commented, acknowledging that such services could be an improvement on the monocultural alternatives often provided in the past.[47] But he went on to say that what is missing from that equation is policies which are "of Māori". Policies which are "of Māori", he argued, recognise what Te Tiriti is truly about: the right of Māori to self-determine our own futures.[48] The view that policies should be not just "by Māori" and "for Māori" but also "of Māori" is central to this article, as it reminds us that decolonisation must include the revitalisation of Māori ideas and knowledges.

As Jackson's comments allude, conversations about decolonisation in Aotearoa New Zealand are inevitably tied to Te Tiriti. While the use of the term decolonisation in this context is relatively recent, calls from Māori for the recognition of rangatiratanga have never ceased, and have been gaining momentum since the 1970s. Those calls since the 1970s have frequently (though not exclusively) drawn on Te Tiriti as part of what Walker has described as the "cultural revival of the twentieth century".[49] It has long been recognised that the guarantee of tino rangatiratanga contained within art 2 of Te Tiriti provides protection over not only material resources, but also Māori social and cultural interests.[50] The Waitangi Tribunal recently reiterated that this includes the protection of Māori ways of being in relation to whānau and child-raising.[51]

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47 Moana Jackson "Imagining Decolonisation" (Speech at BWB Talks, Unity Books, Wellington, 7 May 2021).

48 Jackson, above n 47.

49 Walker, above n 22, at 173.

50 Merata Kawharu "Rangatiratanga and Social Policy" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisisted: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Singapore, 2005) 105.

51 Waitangi Tribunal, above n 1.

The struggle for the recognition of rangatiratanga continues to this day.[52] Rangatiratanga is seen as an essential element of advancing Māori well-being,[53] and is used as a counterweight against the Crown tendency in modern times to refer to "the principles of the Treaty" rather than the text of Te Tiriti itself.[54] It is a reference point for Māori working to effect change within government institutions, which largely still reflect "tikanga Pākehā".[55] Walker argues that "every gain that Māori made in the second half of the twentieth century was achieved by struggling against the hegemony of Pākehā power".[56] The assertion of rangatiratanga is a core element of that struggle. The rallying cries by Māori in relation to the child protection system, especially in the last three years, are not made in isolation. Those calls draw on wider discourses of Māori cultural revival, part of which includes holding the Crown to account for promises made in Te Tiriti.

Often the most meaningful contributions to decolonisation have been achieved through grassroots Māori-led movements, rather than legislative reform. For example, the kōhanga reo movement (which established pre-school Māori "language nests" intended to revitalise te reo Māori), the creation of the Matua Whāngai programme (which sought to provide Māori children in need of care with placements within their whānau), and the Māori land march (which demanded the immediate stop to the seizure of Māori land for public works) were all movements which achieved significant change. A key milestone in the nascent decolonisation movement (though that term was still not widely used in the settler-colonial context at that time) was the development of kaupapa Māori health models – approaches to health which emphasise rangatiratanga, place Māori worldviews at the centre and are "by Māori, for Māori".[57] Kaupapa Māori health models were developed in opposition to the dominance of Western and European frameworks to measure well-being, a dominance which persists today.[58] They recognise that understanding the wider context is important to improving Māori health.[59] As Durie describes, "the treatment of individuals without regard for the wider social context

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52 See for example Maria Bargh "Tino Rangatiratanga: Water under the bridge?" (2007) 8(2) He Pukenga Kōrero: A Journal of Māori Studies 10; Claire Charters and others *He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigneous Peoples in Aotearoa/New Zealand* (Te Puni Kokiri, November 2019); Luke Fitzmaurice and Maria Bargh *Stepping Up: Covid-19 Checkpoints and Rangatiratanga* (Huia Publishers, Wellington, 2021); Valmaine Toki *Māori Seeking Self-Determination or Tino Rangatiratanga? A Note* (2007) 5 Journal of Māori and Indigenous Issues 134; Kawharu, above n 50; and Walker, above n 22.

53 Williams and others, above n 4.

54 Kawharu, above n 50.

55 Ruru, above n 25, at 95.

56 Walker, above n 22, at 357.

57 Mason Durie *Ngā Tini Whetu: Navigating Māori Futures* (Huia Publishers, Wellington, 2011).

58 Kawharu, above n 50.

59 Kawharu, above n 50.

can undermine the integrity of whānau and in the long run disadvantage the individual as well".[60] Whānau well-being is integral within kaupapa Māori health models, with whānau increasingly being seen by Māori "as both a remedy and resource" for advancing Māori health.[61] A focus on improving the collective well-being of Māori, and of whānau in particular, is now widely regarded as essential.[62] Underlying almost all of these concepts is one common theme: that in order for Māori to be well, they must be able to "live as Māori".[63] This is an essential aspect of decolonisation – the assertion of Indigenous ways of living as valid, and as something to be strived for.

These developments have culminated in a recognition that supporting Māori children and families requires doing things in a Māori way. Specifically regarding child protection, Māori academics have argued that to improve outcomes for tamariki and whānau, Māori expertise needs to be at the forefront.[64] Put simply, "Māori must be part of the solution if we are ever to reduce the number of Māori children in care."[65] A focus on rebuilding culture is important both for individual children and families, as there is evidence that family violence is less common in more culturally robust households.[66] It is also important as a broader Māori policy objective.[67] Boulton and colleagues argue that "[l]istening to the voices of whānau is critical to identifying where the system is deficient and how improvements can be made".[68]

One of the major challenges of implementing such changes is the fact that, historically, the Crown has often been more focused on how to use Māori organisations than on how to empower them.[69] Some Māori scholars advocate for partnership with the Crown, arguing, for example, that it is possible to advance the well-being of Māori children and whānau within Crown institutions, as long as certain

60 Mason Durie *Mauri Ora: The Dynamics of Māori Health* (Oxford University Press, Auckland, 2001) at 188.

61 Metge, above n 26, at 293.

62 Durie, above n 60; Leland Ruwhiu and others "Borderland Engagements in Aotearoa New Zealand: Te Tiriti and Social Policy" in Jane Maidment and Liz Beddoe (eds) *Social Policy for Social Work and Human Services in Aotearoa New Zealand: Diverse Perspectives* (Canterbury University Press, Christchurch, 2016) 79; Walker, above n 22; Williams and others, above n 4; and Durie, above n 57.

63 Durie, above n 57; and Durie, above n 60.

64 Williams and others, above n 4, at 4.

65 Boulton and others, above n 4, at 26.

66 Taonui, above n 14.

67 Ruru, above n 25.

68 Boulton and others, above n 4, at 6.

69 Kim Workman "Unconditional Rather Than Reciprocal: The Treaty and the State Sector" in Rachael Bell and others (eds) *The Treaty on the Ground: Where we are headed, and why it matters* (Massey University Press, Auckland, 2017) 169.

aspects of tikanga Māori are upheld.[70] Others are more sceptical of such efforts, arguing that the incorporation of tikanga Māori in mainstream institutions can have more risks than benefits. Mikaere argues that:[71]

> … by supporting legislation that incorporates aspects of tikanga, we actually do more to undermine Māori law than we do by simply continuing to operate within the overtly monocultural models of the present.

According to this approach, injecting aspects of tikanga into the Western legal framework has the potential to mask the Crown's ongoing abuse of power. Supporters of this approach reiterate that programmes designed to help Māori should be primarily aimed at supporting them "to live as Māori".[72] They suggest that rangatiratanga for Māori must be a starting point and a non-negotiable minimum standard.[73]

The tension between these approaches was on display during the recent Waitangi Tribunal hearings into Oranga Tamariki. In its report, the Tribunal empathised with the claimants' calls for an overhaul of the agency.[74] However, it fell short of recommending that the agency be abolished, stating that "while we endorse the call for a transformation to a 'by Māori, for Māori' approach, we do not support calls for the complete abolition of Oranga Tamariki".[75] There were several reasons for the hesitancy of the Tribunal despite its principled agreement with claimants' concerns, including the number of tamariki currently in state care, uncertainty about the short-term capacity of Māori organisations to meet the needs of those tamariki, and evidence provided by several witnesses that partnerships between Oranga Tamariki and Māori organisations could sometimes have major benefits.[76] The Tribunal's sympathy with claimants' concerns, yet reticence to heed calls for abolition, exemplified an ever-present tension in this context. Understanding this tension, and placing child protection issues within the broader context of decolonisation, is essential to making sense of recent controversies.

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70 Ruwhiu and others, above n 62, at 83; and Moana Eruera and Leland Ruwhiu "Ngā Taonga Tuku Iho: Transformative Potential of Māori Principled Wellbeing Frameworks" (Speech at Te Ritorito 2017: Towards whānau, hapu and iwi wellbeing, Pipitea Marae, Wellington, 3 April 2017).

71 Mikaere, above n 4, at 271.

72 Durie, above n 60; and Williams and others, above n 4.

73 Mikaere, above n 4.

74 Waitangi Tribunal, above n 1.

75 Waitangi Tribunal, above n 1, at 182.

76 Waitangi Tribunal, above n 1.

C Decolonising Child Protection

I believe that there are four important ways in which the concept of decolonisation provides a framework through which to address these issues from a Māori perspective. The first is to remind us of the true impact of colonisation. In a previous paper discussing protests against Oranga Tamariki, I have argued that colonisation was never caused solely by the seizure of land; there was always an underlying subjugation of tikanga.[77] It is the loss of tikanga Māori in relation to whānau, the forced inability for Māori to decide for ourselves how to raise and support the next generation, that may cause the most harm in the long term, not the breakdown of individual whānau. I have previously labelled this "the tikanga of whānau".[78] When it comes to child protection, that tikanga is what many Māori believe to be at risk, and that is what we seek to protect and restore. By highlighting the importance of restoring Indigenous ideas, a decolonisation framework provides an opportunity to do that.

The second way a decolonisation framework can help is to highlight the importance of Māori being able to assert our own ways of living. In *Pūao-Te-Ata-Tū*, a landmark 1986 report on the state of the welfare system, a Ministerial Advisory Committee wrote that: "At the heart of the issue is a profound misunderstanding or ignorance of the place of the child in Māori society and its relationship with whanau, hapu, iwi structures."[79] That misunderstanding persists today. More recently, Tupaea has used the term "invisibilised colonial norms" to describe the unexamined assumptions made by those working in the child protection system which undervalue (or explicitly reject) tikanga and mātauranga Māori.[80] The institution of whānau in te ao Māori plays a different role to that of the nuclear family in the non-Māori world, and a decolonisation framework helps to illustrate the effects of that difference.

Thirdly, a decolonisation framework helps to navigate tensions inherent for Māori in deciding when Crown partnerships can be useful, and when they might cause harm. Acknowledging the difference of opinion between those who advocate for Crown-Māori partnerships and those who view self-determination as a non-negotiable starting point is important because it affects how we view the role of the child protection system. If the role of the system is to ensure the safety of individual children, then it may be permissible for this to come at the cost of their whānau, and it may be worth partnering with the Crown to do so. However, if reversing the impacts of colonisation is an essential first step towards improving outcomes for Māori, then iwi and other Māori organisations may be more

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77 Fitzmaurice, above n 38.

78 Fitzmaurice, above n 38, at 167.

79 Ministerial Advisory Committee *Pūao-te-Ata-tū: The Report of the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare* (Department of Social Welfare, June 1986) at 7.

80 Morgan Tupaea "He Kaitiakitanga, He Māiatanga: Colonial Exclusion of Mātauranga Māori in the Care and Protection of Tamaiti Atawhai" (MSc Thesis, University of Auckland, 2020) at 2.

reluctant to partner with a Crown agency whose priorities are more individualistic, even if there are material benefits to doing so. These two approaches are not a complete dichotomy: indeed, this article argues that partnership-based approaches in the short term can sometimes help to enable rangatiratanga in the long term. Nevertheless, the role of the Crown in initiatives such as these remains a source of tension, and understanding that tension from a Māori perspective is important if we are to resolve it. A decolonisation framework helps us to do that.

Finally, a decolonisation framework places the responsibility for reversing the harms of colonisation on the institutions that caused those harms in the first place. One aspect of the State's response to Māori criticisms of Oranga Tamariki over the past three years has been to point towards new laws and policies aimed at improving outcomes for tamariki Māori. This was demonstrated in the Waitangi Tribunal hearings, where the Crown pointed to a raft of changes within Oranga Tamariki since 2017 as evidence for its claim that the principles of Te Tiriti/the Treaty had not been breached.[81] The primary focus within such responses tends to be on new things the Crown is doing, with less focus on the things the Crown has stopped doing. However, improving outcomes for Māori requires more than just the development of new systems and policies: it also requires the interrogation and dismantling of old ones. A decolonisation framework helps keep that dismantling process in full focus.

III THE CURRENT LEGAL FRAMEWORK

The next section of this article outlines the current legal framework for child protection in Aotearoa New Zealand, with a view to then analysing how it may be decolonised. The current legal framework is governed by four key instruments: the Oranga Tamariki Act 1989 (the Act), Te Tiriti, the United Nations Convention on the Rights of the Child (UNCRC)[82] and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[83] As discussed below, each of these frameworks carries different weight within the Aotearoa New Zealand legal system, but understanding all four is necessary to understand the legal framework which underpins the child protection system.

The legal landscape relating to tamariki and whānau Māori within a child protection context is complex. The sheer number of competing interests and principles in the Oranga Tamariki Act has been described by the former Children's Commissioner as creating significant confusion among the child protection workforce.[84] The potential consequences of that confusion are significant, with the former Children's Commissioner arguing, for example, that children's physical safety is sometimes

81 Waitangi Tribunal, above n 1.

82 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [UNCRC].

83 United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295 (2007) [UNDRIP].

84 Office of the Children's Commissioner, above n 1.

erroneously seen as overriding other principles in the Act, leading to a presumption of removal in some cases.[85] Further complexity is added when considering the additional obligations imposed by the UNCRC, the UNDRIP and Te Tiriti. In the case of the latter, the issue is further clouded by the tendency to regard the principles of the Treaty of Waitangi as authoritative, rather than the texts.[86]

An analysis of every provision within the Act, the UNCRC, the UNDRIP and Te Tiriti is beyond the scope of this article. Instead, this section analyses three overarching themes which are present in all four of those instruments: the well-being of children, the importance of cultural identity, and the importance of children and whānau participating in decisions. While these factors may sometimes be in tension, the mention of well-being, cultural identity and participation in each instrument shows that decision-makers may never entirely discard one in favour of the others. There are areas of overlap between the themes and in many instances they will be complementary: all being well, the fulfilment of a child's cultural needs is likely to enhance their well-being, as would the involvement of family members in decisions, and vice versa in both instances. From a Māori perspective, addressing children's cultural needs and the needs of their whānau is likely to enhance their well-being, not diminish it. Nevertheless, when all is not well in the lives of children and whānau, there are ways in which these considerations can be in tension, and the legal framework which governs the child protection system does not always resolve these tensions satisfactorily, particularly for tamariki and whānau Māori. As is discussed further below, the presence of all three themes across all four instruments does not mean that they are given equal weight.

A The Importance of Children's Well-Being

The importance of children's well-being is emphasised most starkly within the Oranga Tamariki Act in s 4A, which states that the well-being and best interests of the child or young person are the first and paramount consideration in care and protection matters.[87] This commitment to children's well-being appears to be a strength of the Act, but s 4A (known as "the paramountcy principle") has been criticised in recent years for promoting an individualised view of children and leading to a misplaced emphasis on children's physical safety, at the cost of broader protective factors.[88] Elsewhere in the Act there are broader references to the well-being of children and young persons,[89]

85 Office of the Children's Commissioner, above n 1.

86 While the courts have broadened their approach to interpreting Treaty provisions in legislation in recent years (see for example *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801), it remains the case that it is the principles of the Treaty, not the texts, which are authoritative. In any case, as discussed below, it is "the principles" which are referred to within the Oranga Tamariki Act 1989.

87 Section 13(1) of the Act further reinforces s 4A, reiterating that the well-being and best interests of the child or young person are the first and paramount consideration in care and protection matters.

88 Waitangi Tribunal, above n 1; and Office of the Children's Commissioner, above n 1.

89 Oranga Tamariki Act, ss 5(1)(b) and 7(2)(b).

as well as children, young persons, their families, whānau, hapū and family groups.[90] Nevertheless, the intent of the legislation is clear: while the well-being of whānau is acknowledged as being important, the well-being and best interests of the child or young person remain the first and paramount consideration.

In the UNCRC the importance of children's well-being is illustrated by art 3, known as the "best interests" principle, which states that in all actions concerning children, the best interests of the child shall be a primary consideration.[91] UNCRC signatories must ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians or other legally responsible individuals.[92] Again, this is an objective that few would argue against, but the UNCRC (in the light of subsequent comments from the Committee on the Rights of the Child) does not just mention this objective; it also suggests that consideration of children's well-being (alongside consideration of their right to participate in decisions) should trump other interests.

More particularly for tamariki Māori, the UNDRIP prioritises the welfare of Indigenous children in art 21, which mentions Indigenous children and youth as a special group requiring particular attention to ensure their needs are met. While this is a less direct reference to children's well-being (especially in the sense of children's physical safety), it is nevertheless important to note that Indigenous children and young people are specifically mentioned in the UNDRIP. For tamariki Māori, this provides an additional layer of protection for their rights under international law. As a non-binding agreement, the UNDRIP does not have the same status in international law as the UNCRC, but the Supreme Court has confirmed the importance of the UNDRIP generally[93] and the non-binding nature of the UNDRIP in international law does not diminish its importance in Aotearoa New Zealand.[94]

Finally, Te Tiriti also emphasises children's well-being, with the guarantee to Māori of tino rangatiratanga over kāinga requiring the state to provide tamariki and whānau with the resources and the structural conditions they need to thrive.[95] The orthodox legal position in relation to Te Tiriti remains that it is not directly enforceable unless incorporated into legislation.[96] However, the courts have nevertheless recognised the significance of Te Tiriti, despite so far declining to overturn the

90 Sections 4 and 7(2)(c).

91 UNCRC, art 3(1).

92 Article 3(2).

93 See for example *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67.

94 Susan Glazebrook "The Declaration on the Rights of Indigenous Peoples and the Courts" (2020) 7 Te Tai Haruru: Journal of Māori and Indigenous Issues 50.

95 Waitangi Tribunal, above n 1.

96 *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590 (PC).

precedent regarding its enforceability.[97] Te Tiriti has been held to carry weight in all matters in which it has relevance, including in the realms of whānau and child protection,[98] and the general importance of Te Tiriti is being increasingly recognised by the judiciary.[99] In any case, Te Tiriti has been incorporated in child protection legislation since 2019, with the passage of s 7AA of the Act. Although Te Tiriti is not a document specifically concerning child protection, the combination of s 7AA and its general importance means there can be no room for doubt over its relevance to this issue.

B An Emphasis on Cultural Identity

Cultural identity also features throughout each document. The Act contains several references to tikanga – both generally (as reflected in the general principles) and specifically. General principles include support for whānau, hapū and iwi,[100] reference to the principles of the Treaty of Waitangi,[101] and the incorporation of specific tikanga principles such as whakapapa, whanaungatanga and mana tamaiti.[102] The cornerstone of the Act as far as cultural identity is concerned is s 7AA, mentioned briefly in the previous section, which describes a series of obligations intended "to recognise and provide a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi)".[103] In order to give effect to s 7AA, the policies and practices of Oranga Tamariki must have the objective of reducing disparities between Māori and non-Māori children, by setting measurable outcomes for Māori.[104] Section 7AA reiterates the principles of mana tamaiti, whakapapa and whanaungatanga.[105] Oranga Tamariki must also seek to develop "strategic partnerships" with iwi and Māori organisations, including iwi authorities.[106] Any iwi or Māori organisation may invite the Chief Executive to enter into a strategic partnership[107] and the Chief Executive must consider and respond to every invitation, but they are not required to accept such invitations.[108] Strategic partnerships may provide

97 Jacinta Ruru and Jacobi Kohu-Morris "'Maranga Ake Ai' The Heroics of Constitutionalising Te Tiriti O Waitangi/The Treaty of Waitangi in Aotearoa New Zealand" (2020) 48 Fed L Rev 556.

98 *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC).

99 See for example *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 86.

100 Oranga Tamariki Act, ss 4(1)(c), 4(1)(d), 4(1)(h), 13(2)(b), 13(2)(h) and 13(2)(i)(iii)(A).

101 Sections 4(1)(f) and 4(1)(g).

102 Sections 4(1)(g), 5(1)(b) and 13(2)(i)(iii)(C).

103 Section 7AA(1).

104 Section 7AA(2)(a).

105 Section 7AA(2)(b).

106 Section 7AA(2)(c).

107 Section 7AA(3).

108 Section 7AA(4).

opportunities for the Chief Executive to delegate functions under the Act to iwi and Māori organisations.[109]

Indigenous children and the importance of a child's cultural identity are also included in the UNCRC. Article 30 recognises the rights of Indigenous children (alongside the rights of ethnic, religious or linguistic minorities), stating that Indigenous children have the right to enjoy their own culture, religion and language. Unlike many of the rights contained within the UNCRC, art 30 is not intended to be individualistic. The rights it recognises are to be exercised collectively with other members of the child's ethnic, religious, linguistic or Indigenous community.[110] General Comment 11 notes that the right recognised by art 30 "is conceived as being both individual and collective and is an important recognition of the collective traditions and values in indigenous cultures".[111]

Unsurprisingly, however, the cultural rights of Indigenous children feature far more heavily in the UNDRIP. Under the UNDRIP, Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate in the political, economic, social and cultural life of the state.[112] They have the right to protection against assimilation and destruction of their culture, and the right to redress from the state when such assimilation or destruction occurs.[113] The UNDRIP protects the cultural,[114] religious[115] and linguistic[116] traditions of Indigenous peoples, and the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with states.[117]

The latter provides the link, for Māori, between the UNDRIP and Te Tiriti, clarifying that while the UNDRIP can add new rights, it cannot remove existing ones. The relationship between the UNDRIP and Te Tiriti was the subject of a recent report, *He Puapua: Report of the Working Group*

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109 Section 7AA(2)(c).

110 UNCRC, art 30.

111 Committee on the Rights of the Child *General Comment No 11: Indigenous children and their rights under the Convention* UN Doc CRC/C/GC/11 (January 2009).

112 UNDRIP, art 5.

113 Article 8.

114 Article 11.

115 Article 12.

116 Article 13.

117 Article 37(1).

on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand (*He Puapua*).[118] The theme of "culture" within that report includes the goal that:[119]

> Iwi, hapū and whānau will be exercising authority over all aspects of their culture, including the ability to control, protect and develop their cultural and natural heritage – ngā taonga tuku iho.

He Puapua itself is not government policy; it was intended by the authors as a starting point for a broader public conversation, but it does provide a useful illustration of what it might look like if the rights within the UNDRIP were upheld.

Te Tiriti itself is also a fundamental protection of Māori cultural identity, with the guarantee of tino rangatiratanga over taonga in art 2 providing an all-encompassing protection for tikanga Māori. The Waitangi Tribunal has stated that the obligations on the Crown inherent in Te Tiriti to actively protect Māori cultural interests are wide-ranging, and not confined to historical grievances.[120] From a Māori perspective, the Tribunal has articulated this as involving support for Māori "to exercise authority over their own affairs as far as practicable within the confines of the modern State".[121] These guarantees have clear implications within a child protection context.

C The Participation of Children in Decision-Making

Finally, all four frameworks include guarantees relating to children's participation in decision-making. References to participation are littered throughout the Oranga Tamariki Act, in the general principles and purposes,[122] the general duties of the Chief Executive of Oranga Tamariki,[123] and the principles which apply to care and protection matters.[124] Particularly relevant is s 11, which in certain proceedings requires the state to encourage and assist children and young people to participate in decisions, to the degree appropriate for their age and maturity.[125] That section prescribes a number of things which a decision-maker must attend to in order to ensure children have the best opportunity possible to share their views and have them taken into account.

The Act also provides for whānau participation in decision-making, particularly within FGCs. FGCs are the child protection system's central decision-making mechanism, described by the former

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118 Charters and others, above n 52.

119 At v.

120 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011).

121 Waitangi Tribunal *The Ngāpuhi Mandate Inquiry Report* (Wai 2490, 2015) at 23.

122 Oranga Tamariki Act, ss 4(1)(a) and 5(1)(a).

123 Sections 7, 9, 10 and 11.

124 Section 13(b)(iii).

125 Section 11(2)(a).

Children's Commissioner as its "jewel in the crown".[126] The Act enables FGCs to consider whichever matters relating to the care or protection a child or young person as they think fit.[127] The child or young person in respect of whom the FGC is convened is entitled to attend the FGC,[128] but the FGC co-ordinator has a broad discretion to exclude them. The child or young person's parents, guardians and caregivers are entitled members (as well as members of their family, whānau, hapū, iwi or family group), but the co-ordinator retains the same broad discretion to exclude such people.[129] The person co-ordinating the FGC (who is employed by Oranga Tamariki) must make reasonable endeavours to consult with the child or young person's family, whānau, hapū, iwi or family group,[130] and must give effect to the wishes expressed by those people as far as is practicable.[131]

The theme of participation in decision-making is central to the UNCRC. Article 12 provides children who are capable of forming views with the right to express their views in all matters affecting them and to have those views be given due weight, in accordance with their age and maturity. This has subsequently become known by children's rights advocates as "the right to participation". Article 12 creates not only a right in itself, but also a general principle that should be taken into account in the interpretation of all other rights.[132] It is complemented by art 13, which provides children with the right to freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds.[133]

The right to self-determination in art 3 of the UNDRIP is arguably a guarantee of participation to all Indigenous peoples in decisions which affect them. Article 3 states that Indigenous peoples have the right to self-determination and, by virtue of that right, may freely determine their political status and freely pursue their economic, social and cultural development. This is "a general umbrella principle"[134] through which all other rights in the UNDRIP must be assessed (similar to the status of

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126 Andrew Becroft "Family Group Conferences: Still New Zealand's Gift to the World?" (December 2017) Children's Commissioner <www.occ.org.nz> at B.

127 Oranga Tamariki Act, s 28(a).

128 Section 22(1)(a).

129 Section 22(1)(b).

130 Section 21(1)(b).

131 Section 21(1).

132 Committee on the Rights of the Child *General Comment No 12: The right of the child to be heard* UN Doc CRC/C/GC/12 (1 July 2009).

133 Laura Lundy "'Voice' is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child" (2007) 33 British Educational Research Journal 927.

134 Rodolfo Stavenhagen "Making the Declaration Work" in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Working Group for Indigenous Affairs, Copenhagen, 2009) 352 at 365.

art 12 of the UNCRC). Another general principle of the UNDRIP is art 19, which obliges states to consult and cooperate with Indigenous peoples when considering measures that may affect them, in order to obtain their free, prior and informed consent. Other principles apply more specifically to child protection. Article 18 states that Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves, in accordance with their own procedures. They also have the right to maintain and develop their own Indigenous decision-making institutions.[135] Similarly, Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions.[136] These rights have been applied to the Aotearoa New Zealand context within *He Puapua*, with that report setting out a goal under the theme of "rangatiratanga" that by 2040 "Māori will be exercising authority over Māori matters as agreed by Māori".[137]

Finally, participation in decision-making relating to tamariki and whānau is a central aspect of Te Tiriti.[138] The protection of Māori rights to participation in decision-making flows from the overall Te Tiriti guarantee of tino rangatiratanga over kāinga.[139] In determining what the Te Tiriti guarantee of tino rangatiratanga over kāinga encompasses, the Waitangi Tribunal has criticised "an astonishing level of intrusion into the lives of whānau by the State".[140] The Tribunal has also stated that the Treaty principle of partnership gives Māori the right to choose how we organise ourselves and how we express our tino rangatiratanga.[141] Applied to this particular context, these are guarantees to Māori that (at a bare minimum) we have an implicit right to take part in decisions about the safety and well-being of our children. Although Te Tiriti is not a document specifically relating to child protection decisions, its application in this context is clear to see.

D Overarching Themes Across the Four Core Instruments

There is value in illustrating these themes across all four instruments for two reasons. The first is to highlight that, as far as the law is concerned, well-being, cultural identity and participation are all crucial considerations for tamariki and whānau Māori. The mention of all three imperatives across the four instruments demonstrates that they are not considered, legally at least, fundamentally opposed. This is important because it dispels the myth that prioritising one of these objectives must mean

135 UNDRIP, art 18.

136 Article 20.

137 Charters and others, above n 52, at iv.

138 Waitangi Tribunal, above n 1.

139 Treaty of Waitangi/Te Tiriti o Waitangi, art 2.

140 Waitangi Tribunal, above n 1, at 13.

141 Waitangi Tribunal, above n 1.

discarding the others. They may sometimes be tension, but decision-makers may never completely ignore one priority in favour of the others; they are all relevant considerations.

The second reason, however, is that an analysis of these instruments also illustrates the opposite point. While all four instruments mention all three objectives, each places a different emphasis on one or two than it does on the others. Within the Act, the well-being and best interests of the individual child are the first and paramount consideration, with a lesser emphasis on participation and cultural identity. This plays out in practice, in relation to FGCs, for example. The flexibility provided by the Act should enable cultural considerations to be central to FGC processes (if participants deem that to be appropriate) and the legislative provisions described above should enable tamariki and whānau members to participate meaningfully in decisions. However, what is also described above is a broad discretion retained by the Crown. While the legislation creates opportunities for whānau, it also ensures that FGCs cannot be truly whānau-led if the wishes of the whānau clash with legal requirements or the views of the co-ordinator. Furthermore, where an agreement is unable to be reached within an FGC the Chief Executive of Oranga Tamariki retains the power to take any action under the Act that they consider appropriate.[142] From a Māori perspective this means that FGCs have the potential to further diminish Māori interests, as the power of whānau, hapū and iwi to influence the process is subordinate to the power of the state.

In the UNCRC, the best interests principle and the right to participation are framed as essential (by virtue of those two rights being overarching principles), and more important than broader rights to cultural identity. The UN Committee on the Rights of the Child has explicitly said as much. In General Comment 11, the Committee stated that while consideration of the collective cultural rights of an Indigenous child forms part of their best interests, ultimately it is the best interests of the specific child that are always the primary concern, not the best interests of the collective.[143] Conversely, the rights of children are mentioned in the UNDRIP, but collective rights to Indigenous self-determination (which are inherently a protection of cultural identity) are far more prominent. Similarly, Te Tiriti, though relevant to individual children's well-being, is ultimately a protection of collective cultural identity for Māori, with subsequent protections flowing from that overarching right.

The legal framework for child protection in Aotearoa New Zealand mentions some important objectives from a Māori perspective – cultural identity is consistently included as a relevant factor in decisions about children and whānau, and legal tools exist (such as Te Tiriti and the UNDRIP) to uphold the collective rights of Māori to self-determination and tino rangatiratanga. The presence, and increasing relevance, of these tools is positive, but it does not follow that those legal settings meet the needs of Māori. The inclusion of cultural identity factors in the legal framework for child protection is therefore less encouraging than it may appear. This is an example of the dynamic described by

142 Oranga Tamariki Act, s 31(2).

143 Committee on the Rights of the Child, above n 111.

Mikaere, whereby references to tikanga in Western laws have the potential to mask broader abuses of state power.[144] In key aspects of the child protection system the state retains the power to make key decisions regarding tamariki and whānau Māori, such as deciding how much weight tikanga should be given, or whether to partner with iwi and Māori organisations, or when considerations of individual children's well-being should trump other factors. If child protection outcomes for tamariki Māori are to ever improve, that must change.

As for what that change might look like, prioritising Māori considerations such as whānau well-being and tino rangatiratanga will not mean losing sight of the interests of individuals. From a Māori perspective, prioritising collective well-being will enhance the well-being of individual tamariki, not diminish it. To assume otherwise risks reinforcing the racist assumption that has pervaded child protection law and policy in the past: that Māori are incapable of caring for our most precious taonga – our tamariki and mokopuna. As discussed below, there are tikanga principles which can ensure a balance is struck between focusing on the individual and focusing on the collective. Implicit within the legal framework for child protection in Aotearoa New Zealand should be an assumption that iwi, hapū and whānau Māori are entirely capable of caring for our own. The question then becomes how the child protection framework might change to reflect that assumption.

IV KAUPAPA MĀORI LEGAL THEORY

In my view, the decolonisation of the child protection system is necessary to address the issues faced by tamariki and whānau Māori in contact with that system. In Part V of this article I address the substantive issue of what those changes might look like by outlining six tikanga principles which I believe can guide reform. However, before turning to that substantive question, it is necessary first to discuss the process of how such changes might be given effect. I argue that this process issue is just as important as the substantive issue if the changes are to be made safely, in a way which does not marginalise Māori further.

The prophet Te Kooti is credited with the saying, "mā te ture ano te ture e aki – only the law can be set against the law". I have often wondered whether that is actually true. It seems to me to be at odds with Mikaere's warning that mere improvements to the Pākehā legal system can do more harm than good if we are not careful.[145] It also seems at odds with the history of child protection law in Aotearoa New Zealand over the last 30 years. The passage of the Children, Young Persons and Their Families Act in 1989 could perhaps have been described at the time as an example of "the law being set against the law", but that legislation fell far short of its goal of achieving better child protection outcomes for Māori. It seems to me that surface-level legal changes which mention tikanga without truly understanding it will never be enough to achieve the aspirations of Māori.

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144 Mikaere, above n 4.

145 Mikaere, above n 4.

At the same time, however, other Māori jurists have suggested that tikanga Māori can have a transformative effect on our legal landscape.[146] Internationally, Indigenous legal scholars have argued that the reassertion of Indigenous legal orders can drive decolonisation efforts.[147] Furthermore, the increasing importance of tikanga in the Aotearoa New Zealand legal system means that, in reality, tikanga is already part of our legal landscape, and its influence is only likely to grow. In my view a crucial question, therefore, is how can tikanga be incorporated within child protection law appropriately, in a way which does not cause further harm.

Kaupapa Māori legal theory is an attempt to develop a framework around these questions in order to problematise assumptions, highlight the range of perspectives on these issues and provide a tentative pathway forward. It is a framework I have developed to guide my own thinking on how a tikanga-based reform of the child protection system would work, and how it might avoid some of the pitfalls inherent in incorporating tikanga within the law. I suggest that this may be a useful tool during the reform of the child protection system, and perhaps more broadly as well. There are four aspects to kaupapa Māori legal theory – Taihoa, Whakarongo, Whakamana and Whakatika.

The first core aspect of kaupapa Māori legal theory is an assertion that incorporating tikanga in the law is not inevitably good. I have labelled this "Taihoa", which simply means to pause. My intent here is to problematise the assumption that the incorporation of tikanga in the law is inevitably positive for Māori. Aotearoa New Zealand's child protection legislation has included references to tikanga for over 30 years, and those references have not been enough to stop the system failing Māori.[148] The 2017 reforms which resulted in the passage of the Oranga Tamariki Act further incorporated tikanga into the legislation, but the events of the last few years have shown how ineffective those changes were at reducing the harm that Oranga Tamariki has caused to Māori.[149] The Waitangi Tribunal described how those legislative changes were insufficient, saying that "unless the core precepts of the care and protection system are realigned, with power and responsibility returned to Māori, disparity will be a persistent feature of the system".[150] Legislative references to tikanga will never be a panacea for Māori and it is crucial that those advocating for Māori interests, whether they are Māori or non-Māori themselves, do not assume that to be the case. In order to examine whether that is the case, we must first taihoa.

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146 Williams, above n 15.

147 Val Napoleon "Thinking about Indigenous Legal Orders" in René Provost and Colleen Sheppard (eds) *Dialogues on Human Rights and Legal Pluralism* (Springer, New York, 2013) 229.

148 Emily Keddell and others "A fight for legitimacy: reflections on child protection reform, the reduction of baby removals, and child protection decision-making in Aotearoa New Zealand" (2022) 17 Kōtuitui: New Zealand Journal of Social Sciences Online 378.

149 Waitangi Tribunal, above n 1.

150 At 154.

I have labelled the second aspect of kaupapa Māori legal theory "Whakarongo", which means to listen. On issues of decolonisation and the incorporation of tikanga in law, there is a continuum of perspectives which highlight the range of the strengths and risks of different approaches. On the one hand, Māori legal jurists have championed the incorporation of tikanga in the law as a way to advance the interests of Māori. In contrast, Māori lawyer Annette Sykes has described what she labels "the myth of tikanga in the Pākehā law".[151] She argues that because colonial law was one of the most powerful tools of colonisation, it is difficult to see how it could ever be a tool of decolonisation. She describes the incorporation of tikanga into common law as "just window dressing", arguing that Māori values will never be recognised within a colonial paradigm.[152] Within these contrasting positions there is a continuum of opinions from Māori on tikanga and the law. The goal of "Whakarongo" is not to resolve those tensions; rather, it is the more modest objective of highlighting that this range of opinions exists. This may be obvious to those well-versed in tikanga Māori, so perhaps this aspect of kaupapa Māori legal theory is as much for non-Māori as it is for Māori. However, given the incorporation of tikanga in the law is becoming increasingly mainstream, in my view it is important that this is understood more broadly. Kaupapa Māori legal theory is designed to help with that by encouraging us to whakarongo, and by providing a framework for critical engagement with these ideas.

The third goal of kaupapa Māori legal theory is to provide a tentative pathway forward through the concept of "Whakamana", which means to uphold mana. I believe the starting point in resolving these issues must be the question of power and rangatiratanga. What the range of perspectives on tikanga and the law have in common is a consensus that the way forward for Māori is through the exercise of rangatiratanga, enabled primarily (though not exclusively) by a recognition of mana and transfer of power from the Crown. While Williams and Sykes may disagree on whether the incorporation of tikanga in the law can achieve that, I believe those are contrasting theories of change, not fundamentally opposed goals. Kaupapa Māori legal theory seeks to highlight issues of power by asking whether any given change involving tikanga and the law will enable rangatiratanga and transfer power to Māori. If it will, perhaps it can be a tool of decolonisation; if not, it is probably more like window dressing of the kind that Sykes describes. "Whakamana" is intended to keep that in focus.

The fourth and final aspect of kaupapa Māori legal theory is "Whakatika", which means to correct or resolve, but can also mean to set out (as in, on a journey). To give effect to this concept, I have used the term "legislative off-ramps" to describe legislative changes which can provide short-term improvements for Māori, but also help to set in motion the long-term constitutional changes required to truly achieve equity.[153] Short-term legislative changes, viewed in isolation, may not achieve

151 Sykes, above n 4.

152 Sykes, above n 4.

153 Margaret Mutu and others *He Whakaaro Here Whakaumu Mō Aotearoa. The Report of Matike Mai Aotearoa - the Independent Working Group on Constitutional Transformation* (Matike Mai Aotearoa, 2016).

transformation on their own, but in my view there is no silver bullet here. This is not a defeatist statement (I personally believe that transformative change for Māori is not only possible, but inevitable), but a pragmatic one, which recognises that in some areas of law and policy such changes are a long way off. Instead, what is needed is a way to simultaneously advance both short-term and long-term goals for Māori in any given reform process. I believe that this dual focus has often been missing in the child protection reforms of the past.[154]

The master's tools may never dismantle the master's house, but perhaps they can help us build a road out of the master's neighbourhood. In my view, a crucial goal for those seeking to reform the law in a way that incorporates tikanga should be to identify the changes which can provide the best starting point for further changes in the future. In the "off-ramp" analogy, our current laws are like a highway, built primarily by non-Māori, intended primarily to reach a non-Māori destination. The goal according to this theory of change is not to destroy the highway, but to build off-ramps, which can be short-term starting points on the longer-term journey towards our ultimate destination. The off-ramps themselves are not the ultimate goal, but they can be a crucial first step. The goal of "Whakatika" is intended to achieve this.

Kaupapa Māori legal theory is the term I have used to describe these four ideas collectively. It is intended to respond to the current climate in Aotearoa New Zealand, where tikanga Māori is increasingly seen as relevant, not just by law and policy-makers, but also within society more broadly. There are potential benefits to that increasing recognition, but the risk that tikanga could be co-opted is high. As Māori, we need to search for a way to mitigate those risks, and kaupapa Māori legal theory is intended to contribute to that search. Having established those general principles, the rest of this article illustrates how such an approach could assist in the reform of the child protection system.

V THE TIKANGA PRINCIPLES WHICH COULD UNDERPIN A DECOLONISED SYSTEM

In this final section I analyse six tikanga principles which I believe can anchor the necessary changes to the child protection system. These are drawn from my PhD research on the child protection system, part of which sought the views of a group of young people, whānau and professionals with first-hand experience of Oranga Tamariki.[155] The empirical component of my thesis was focused more narrowly on child protection decision-making, rather than the system as a whole, so a full discussion of the interviews is outside of the scope of this article. However, the six tikanga principles described here were all points of convergence between the empirical components of my thesis and the

154 The reforms which led to the creation of Oranga Tamariki, for example, initially proposed a four-year timeframe for the implementation of the required changes. See Rebstock and others, above n 8.

155 Fitzmaurice, above n 7.

theoretical components. I believe they provide a useful starting point for a discussion on decolonising the child protection system.

The six tikanga principles described below are not necessarily exhaustive – in order to succeed, any framework will need to be locally responsive if it is to be effective, and that may require adaptation in particular contexts. Furthermore, while these principles are intended to span child protection law, policy and practice, the primary focus of this article is on the legal aspects of the reforms, and it may be that further adaptation is needed when it comes to making changes to policy and practice. Nevertheless, I believe the following six principles can provide an overarching framework for change.

A Two Core Values – Mana and Rangatiratanga

The first two principles, which I believe could be the core values of a decolonised child protection system, are mana and rangatiratanga. Taken together, these two values provide a way to implement short-term changes without losing sight of the long-term vision, and to implement individually focused changes alongside systemic ones.

Mana has been described as relating to a person's power, prestige, authority, reputation, influence and control.[156] It has both a collective and a personal element, the latter being akin to the concept of inherent dignity.[157] It can also include the concept of respect and intrinsic value.[158] As Temara and Mead state, "Mana is one of the most valuable and important things a person can have."[159] The sources of mana can be broken down into two categories: those which are earned or acquired through individual actions or achievements (mana tangata), and those which are inherited (mana tūpuna).[160] Mana also has particular significance for children. Mead describes mana as a central aspect of the "kaihau-waiū" or "birthright" of a Māori child, which includes "everything that a child can expect by being born a Māori".[161] Although the kaihau-waiū is broader than just the concept of mana, mana is a core foundation.

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156 Pou Temara and Hirini Moko Mead *Peter Hugh McGregor Ellis v The Queen: Statement of Facts Filed Pursuant to S9 of the Evidence Act 2006* (January 2020).

157 Mead, above n 15.

158 Office of the Children's Commissioner *Mana Mokopuna: Understanding the experiences of children, young people and their whānau to improve the services of Oranga Tamariki* (September 2018).

159 Temara and Mead, above n 156, at [79].

160 Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, Auckland, 1991); Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (UBC Press, Vancouver, 2016); Mead, above n 15; and Temara and Mead, above n 156.

161 Mead, above n 15, at 39.

An overarching focus on mana within the child protection system could achieve several things. First, it could contribute to a more culturally appropriate system, in both the short term and the long term, by appropriately recognising mātauranga Māori. If decolonisation depends on reasserting Māori ideas,[162] then acknowledging and prioritising Māori principles within the child protection system can contribute to this. This article has described how the current legal settings for child protection in Aotearoa New Zealand mention Māori considerations but do not sufficiently prioritise them. An overarching emphasis on mana can help to remedy that underemphasis. It could support Māori to "live as Māori",[163] and highlight the wider supports that tamariki and whānau need to live with dignity. A focus on mana could encourage listening to children while also emphasising their well-being and cultural identity. This can ensure decision-makers are unable to prioritise one of those imperatives at the expense of the others, as the current legal framework encourages them to do.

Crucially, however, mana achieves many of the objectives of a children's rights framework without treating children as isolated individuals. Mana is both an individual and a collective concept,[164] and a focus on mana may help to provide a better balance between the views of tamariki, whānau and professionals, which are currently weighted too heavily towards the latter. Furthermore, a focus on the mana of children will ensure that a focus on children's physical safety remains present within the child protection system. While physical safety may currently be overemphasised (leading to potentially unintended consequences), it is unimaginable that a focus on keeping children physically safe would be discarded entirely. Jenkins and Mountain-Harte have argued that prior to colonisation it was believed by Māori that "[t]o harm the child was to harm the atua".[165] A focus on mana may help to restore that belief, ensuring that children's physical safety remains a feature of the system, in an appropriate balance with other objectives.

Mana may not, on its own, be the ultimate solution to the issues described in this article, but it may provide a lever with which to shift power away from the state and towards tamariki and whānau Māori. This would recognise the place of tamariki Māori within their whānau in a Māori worldview, ensure that an emphasis on safety is not discarded, and help shape a more relational view of children's participation in decision-making, avoiding the pitfalls of the child-centredness discourse and paramountcy principle which dominate the current system.[166] A reorientation of the system towards mana would also create space for other tikanga principles to be applied in practice, such as hauora, oranga and the tikanga described below.

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162 Elkington and others, above n 46.

163 Durie, above n 60.

164 Temara and Mead, above n 156.

165 Jenkins and Mountain-Harte, above n 28, at 30.

166 Waitangi Tribunal, above n 1.

Alongside a focus on mana, an emphasis on rangatiratanga would have broader impacts. On a personal level, rangatiratanga can describe individual leadership qualities, but it is more often used in a broader sense to describe Māori forms of leadership, collective self-determination and political authority.[167] The term comes from the word rangatira, meaning leader. Rangatira were leaders who could exercise the authority assured to them by qualities such as mana and whakapapa for the benefit of their people. "Rangatira considered themselves first among equals, responsible for the political and economic well-being of the hapū."[168] As Tomas notes, "the key to good leadership was the ability to safeguard and maximise the well-being of the people, and the main reference point was 'the people' themselves".[169] As this suggests, rangatiratanga was and is granted on behalf of the community.

An emphasis on rangatiratanga within the child protection system would align the push for reform with broader calls by Māori for constitutional transformation,[170] as well as the specific calls for rangatiratanga to be upheld in other realms of social policy, such as health.[171] It could support the shift towards returning control of kāinga and whānau to Māori, in line with the recommendations of the Waitangi Tribunal,[172] and help to prevent the further loss of tikanga experienced by Māori over the past two centuries. Rangatiratanga is more likely to be realised at a local level,[173] and refocusing the child protection system around rangatiratanga may help to decentralise the system away from top-down control towards hapū- and iwi-led local solutions. Those solutions may take different forms and use different labels, for some this may be more about mana motuhake (independence), or another term entirely. But the principle of rangatiratanga means that the power to decide what form these initiatives take will sit with whānau, hapū and iwi, not with a centralised government department.

Identifying rangatiratanga as an overarching principle of the child protection system would create opportunities for "by Māori, for Māori" systems to be developed, reflecting the recommendations of the Waitangi Tribunal inquiry (though also noting the need for "of Māori" services described

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167 Mead, above n 15.

168 Ranginui Walker and Tracey McIntosh "Kāwanatanga, Tino Rangatiratanga and the Constitution" in Robert Patman, Iati Iati and Balazs Kiglics (eds) *New Zealand and the World: Past, Present and Future* (World Scientific Publishing Company, New Jersey, 2017) 204.

169 Nin Tomas "Māori Concepts and Practices of Rangatiratanga: 'Sovereignty'?" in Julie Evans and others (eds) *Sovereignty: Frontiers of Possibility* (University of Hawaii Press, Honolulu, 2013) 220 at 231.

170 Charters and others, above n 52; and Mutu and others, above n 153.

171 Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019).

172 Waitangi Tribunal, above n 1.

173 Mason Durie "Tino Rangatiratanga" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, South Melbourne, 2005) 3.

above).[174] It would centre tikanga Māori and build on what has been termed the "Māori cultural infrastructure".[175] In some parts of the country this is already happening,[176] and an overarching emphasis on rangatiratanga will ensure this happens more consistently. The Crown's role in supporting rangatiratanga in some parts of the country may simply be to get out of the way, as in many places the necessary systems to support tamariki and whānau Māori already exist in iwi and other Māori community organisations.[177]

Importantly, rangatiratanga still creates space for individuals. Although it primarily relates to collective self-determination, the ongoing exercise of rangatiratanga depends on the ability to safeguard and maximise the well-being of people,[178] which means the well-being of individuals can never be abandoned. Like mana, it is a concept that has both individual and collective dimensions.[179] This is a crucial consideration which can mean that although a rangatiratanga-based system would strongly emphasise collective well-being, the interests of individuals would not be completely subsumed. Both mana and rangatiratanga ground the rights of tamariki Māori in their rights as Māori first and foremost. In many cases, focusing on mana and rangatiratanga may unfortunately illustrate how infrequently these tikanga are upheld.

B One Central Decision-Making Mechanism – Wānanga

A decolonised child protection system would have Indigenous methods of decision-making at its core. In Aotearoa New Zealand this could be achieved by disestablishing FGCs and making wānanga the centre of the system. The Oranga Tamariki Ministerial Advisory Board recently commented that FGCs are no longer seen by whānau as whānau-led decision-making mechanisms.[180] In the light of calls for more fundamental reform,[181] I believe it is time to do away with FGCs entirely, replacing them with a more culturally appropriate decision-making mechanism rather than trying to reform them further. Wānanga is one such mechanism.

Wānanga is both a traditional Māori practice for collectively sharing, discussing and advancing mātauranga Māori (Māori knowledge), and a modern process, grounded in those traditional practices,

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174 Waitangi Tribunal, above n 1.

175 Office of the Children's Commissioner, above n 1.

176 Waitangi Tribunal, above n 1.

177 Waitangi Tribunal, above n 1.

178 Tomas, above n 169.

179 Williams, above n 15.

180 Matthew Tukaki and others *Hipokingia ki te kahu aroha, hipongia ki te katoa: The initial report of the Oranga Tamariki Ministerial Advisory Board* (Oranga Tamariki, July 2021).

181 Office of the Children's Commissioner, above n 1; and Waitangi Tribunal, above n 1.

involving collective deliberation, discussion and decision-making. Mahuika and Mahuika describe the purpose of wānanga as "to compose and shape knowledge in a chorus of intention".[182] It is both a noun, referring to the process or forum in which such deliberations occur, and a verb, referring to the act of engaging in those deliberations. The purpose of wānanga "is to come to an understanding, fashion a new view, develop an answer and to create new knowledge".[183]

Adapted to child protection contexts, wānanga could bring tamariki, whānau and other experts together in a more culturally appropriate way than FGCs, and create better ways for them to have their voices heard. At an individual level, child protection wānanga could shift the power imbalances currently present in decision-making forums between tamariki, whānau and professionals.[184] At a system level, wānanga could help to shift power away from the state and towards Māori by playing a part in cultural revitalisation. The practice of wānanga is "a tradition of strict knowledge transmission grounded in deep spiritual and cultural beliefs and values",[185] which could provide a counterweight to the monoculturalism often present in the current child protection system. Child protection wānanga could fit within the current system, but could also be central to a decolonised system in future.

Child protection wānanga would ensure that time is taken to develop relationships, build trust and support tamariki and whānau to feel comfortable sharing their views. Not only do these objectives fit within a te ao Māori worldview, but they also align with what the literature suggests are crucial factors for children having their voices heard.[186] Wānanga could also be a way to ensure that tamariki are viewed as connected to whānau and whakapapa, which is a crucial factor in ensuring they are supported in a way that is culturally appropriate for Māori.[187]

Care would need to be taken to ensure that the process is not alienating to people who are disconnected from their whakapapa, but the flexibility of wānanga could ensure that this is done appropriately. Wānanga can be a culturally restorative experience for participants who have

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182 Nēpia Mahuika and Rangimārie Mahuika "Wānanga as a research methodology" (2020) 16 Alternative: An International Journal of Indigenous Peoples 369 at 371.

183 Te Ahukaramū Charles Royal *Wānanga: The Creative Potential of Mātauranga Māori* (Mauri Ora Ki Te Ao/Living Universe Ltd, Wellington, 2011) at 19.

184 Whānau Ora Commissioning Agency, above n 1.

185 Mahuika and Mahuika, above n 182, at 371.

186 See for example Margaret Bell "Promoting Children's Rights Through the Use of Relationship" (2002) 7(1) Child and Family Social Work 1; Sharon Bessell "Participation in decision-making in out-of-home care in Australia: What do young people say?" (2011) 33 Children and Youth Services Review 496; Mijntje DC ten Brummelaar and others "Participation of youth in decision-making procedures during residential care: A narrative review" (2018) 23 Child and Family Social Work 33; and Ganna G van Bijleveld, Christine WM Dedding and Joske Bunders-Aelen "Children's and young people's participation within child welfare and child protection services: A state-of-the-art review" (2015) 20 Child and Family Social Work 129.

187 Office of the Children's Commissioner, above n 1.

experienced such disconnection.[188] Importantly, wānanga could help to overcome some of the shortcomings of the child protection system by upholding the principles of both mana and rangatiratanga. Wānanga could only be facilitated by someone with a thorough knowledge of tikanga, militating against the risk that the process would be co-opted by the state.

More broadly, wānanga can be a vehicle for the reassertion of tikanga. Wānanga could be a vehicle for reconnection for those disconnected from their whakapapa, and can utilise the resources of the Māori cultural infrastructure.[189] Adopting wānanga as the central mechanism of the child protection system could involve incorporating tikanga in the law in a way that is central to that process, not just as "mere improvements in the Pākehā system".[190] Compared to wider reforms which may require a major paradigm shift, this would require relatively little change, as it could be achieved by making changes to the current legislative framework. Wānanga are therefore an ideal vehicle for achieving both the short-term and long-term goals of reform, and are an example of the "legislative off-ramp" described above.

C Three Key Objectives – Whānau, Whakapapa and Whanaungatanga

Three key objectives could underpin all actions taken within a decolonised child protection system: supporting whānau, centring whakapapa and prioritising the practice of whanaungatanga. Supporting whānau can have both short-term and long-term impacts. In the short term, this can enable whānau to navigate the complexities of the child protection system, which many whānau have said is currently very difficult.[191] It could prevent whānau from being abandoned by professionals and ensure they were more likely to be treated with empathy and respect, which is currently often lacking.[192] Whānau-focused practice would emphasise the strengths of whānau,[193] strengthen the cultural identity of whānau members and would strengthen a sense of belonging and identity for tamariki.[194] It would lead to increased material support for whānau who need it and may help to prevent, at least in some instances, the breakdown of individual families. It would also support whānau self-

188 Mahuika and Mahuika, above n 182.

189 Office of the Children's Commissioner, above n 1.

190 Ani Mikaere "Tikanga as the first law of Aotearoa" (2007) 10 YBNZ Juris 24 at 26.

191 Boulton and others, above n 4; and Williams and others, above n 4.

192 Office of the Children's Commissioner, above n 1.

193 Emily Keddell, Kerri Cleaver and Luke Fitzmaurice "The perspectives of community-based practitioners on preventing baby removals: Addressing legitimate and illegitimate factors" (2021) 127 Children and Youth Services Review 106.

194 Metge, above n 26.

determination and contribute to enabling whānau to live as Māori.[195] All of these are crucial factors in supporting the well-being of tamariki and whānau Māori.

Supporting whānau may also lead to more effective decision-making.[196] Whānau voices would be more likely to be taken into account, and whānau-focused practice may strengthen the trusting relationships required for both tamariki and whānau to have their voices heard.[197] It would prevent the exclusion of essential information which can occur within the current system[198] and which is ultimately counter-productive. Ensuring that the voices of whānau are heard could also help to address, or at least mitigate, the power imbalance that currently exists between the state and whānau in contact with the system.[199]

A renewed focus on whānau would honour the promise of tino rangatiratanga over kāinga in art 2 of Te Tiriti and uphold key principles of the current legislative framework. It would support the rights of tamariki and whānau within the UNCRC and the UNDRIP, and promote whānau participation in decision-making. While in the long term these instruments may need a more fundamental repositioning, in the short term an increased focus on whānau within the application of these instruments will help to improve outcomes for both tamariki and whānau Māori.

More broadly, a focus on whānau would restore the balance between child-centred and whānau-centred practice. This would require social workers to engage with whānau more effectively, and would contribute to the shift towards the "by Māori, for Māori" system that many have suggested is ultimately required.[200] In the longer term, this renewed focus on whānau would begin to restore the tikanga of whānau by highlighting the importance of whānau as a societal institution, rather than prioritising nuclear families.[201] This would contribute to the broader goal of decolonisation by reasserting Indigenous identities, drawing on, as well as strengthening, the Māori cultural infrastructure.

For tamariki and whānau in contact with the child protection system, centring whakapapa would reinforce a view of tamariki and whānau as intrinsically connected. This is something that has been a

195 Durie, above n 60.

196 Keddell, Cleaver and Fitzmaurice, above n 193.

197 Keddell, Cleaver and Fitzmaurice, above n 193.

198 Tukaki and others, above n 180.

199 Whānau Ora Commissioning Agency, above n 1.

200 Keddell, Cleaver and Fitzmaurice, above n 193; Office of the Children's Commissioner, above n 1; Waitangi Tribunal, above n 1; and Whānau Ora Commissioning Agency, above n 1.

201 Fitzmaurice, above n 38.

source of repeated criticism of Oranga Tamariki and its predecessor organisations over many years.[202] A stronger emphasis on whakapapa would build and strengthen a sense of identity and belonging for tamariki and whānau,[203] and help to highlight underlying and intergenerational causes of harm, which could, in turn, help to promote intergenerational solutions. It could also begin to restore whakapapa connections in tamariki and whānau for whom those have been lost.

At a system level, centring whakapapa would help to correct the misunderstanding of the place of tamariki Māori within whānau.[204] It would restore a focus on the social determinants of harm[205] and help to reframe state care as a last resort (given the severe damage which the state care system has caused to whakapapa in the past). A focus on intergenerational solutions emphasised by centring whakapapa could reframe the role of professionals, given that those with whakapapa connections to tamariki and whānau will be there long after professionals have gone. It would also contribute to resolving the tension between child-centred and whānau-centred practice, as a full view of a child's whakapapa would make it impossible to treat them as an isolated individual.

This would broaden the focus of the current system beyond what has sometimes been interpreted as its "core business" of keeping children physically safe. As mentioned above, the former Children's Commissioner has argued that an overemphasis on children's physical safety sometimes leads to an erroneous presumption of removal.[206] If "centring whakapapa" were a key objective of the child protection system, this would help to correct that error. It may contribute to a paradigm shift away from the dominant focus on risk,[207] helping to build the core foundations of a decolonised system.

More broadly, centring whakapapa would restore a foundation of tikanga prior to colonisation. It is an example of the reassertion of Indigenous ways of being, and a potential foundation for the restoration of the tikanga of whānau. A focus on whakapapa may also begin to shift conversations about decolonisation away from an exclusive focus on rights and towards a greater focus on responsibilities, which some Indigenous legal scholars have suggested is a crucial aspect of decolonisation.[208] Whakapapa is not just something that tamariki and whānau have a right to, it is

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202 Ministerial Advisory Committee, above n 79; and Office of the Children's Commissioner, above n 1.

203 Mead, above n 15.

204 Ministerial Advisory Committee, above n 79.

205 Whānau Ora Commissioning Agency, above n 1.

206 Office of the Children's Commissioner, above n 1.

207 Emily Keddell and Ian Hyslop "Ethnic inequalities in child welfare: The role of practitioner risk perceptions" (2019) 24 Child and Family Social Work 409; and Emily Keddell and Tony Stanley "Moving from Risk to Safety: Work with Children and Families in Child Welfare Contexts" in Kate van Heugten and Anita Gibbs (eds) *Social Work for Sociologists: Theory and Practice* (Palgrave Macmillan, New York, 2015) 67.

208 Jeff Corntassel "Re-envisioning resurgence: Indigenous pathways to decolonization and sustainable self-determination" (2012) 1 Decolonization: Indigeneity, Education & Society 86.

also something they have responsibilities towards.[209] Centring whakapapa acknowledges these responsibilities without diminishing the fact that these are also fundamental entitlements for tamariki and whānau.

Finally, prioritising whanaungatanga would strengthen the focus on relationships which is needed to ensure tamariki and whānau have a voice in decision-making.[210] Whanaungatanga highlights the connections between tamariki and whānau, and between tamariki, whānau and all others, as well as upholding key legal obligations within the Oranga Tamariki Act. For social work practitioners, prioritising whanaungatanga would emphasise communication skills, highlight the complex set of skills required to do this work well and illustrate the importance of consistent whānau engagement.[211]

At a system level, an emphasis on whanaungatanga could contribute to both the culture change required within the current system and to decolonisation, by emphasising collective rights and responsibilities.[212] Prioritising whanaungatanga would contribute to broader underlying shifts, such as the restoration of the role of a principle of tikanga which was a foundation of Aotearoa New Zealand society prior to colonisation.[213] Whanaungatanga is a fundamental principle of tikanga which must be central to the changes described above.

VI CONCLUSION

The principles described above could have a major impact on the state-run child protection system, paving the way for both immediate improvements and for its eventual replacement with a system run by, for and with Māori. Potential legal shifts to implement these tikanga principles could include changing the legislative emphasis from an overarching focus on well-being to an overarching emphasis on mana, recognising the importance of rangatiratanga, refocusing the legislation on whānau and directly incorporating Te Tiriti and the UNDRIP. Care would need to be taken to ensure that any legislative shifts actively prioritise tikanga-based principles rather than just mentioning them alongside other factors. As the analysis above has demonstrated, it cannot be taken for granted that legal frameworks which mention cultural considerations necessarily do enough to prioritise them.

In addition to those legal shifts, changes to policy and practice must also take place. Potential policy shifts could include decentralising state services, re-orienting the system away from its focus on "child-centredness", embedding whakapapa as the focus of prevention efforts and increasing government-wide efforts to better recognise tikanga. At a practice level, changes could include reducing the focus on risk, increasing a practice focus on whānau strengths, improving efforts to

209 Williams, above n 15.

210 Keddell, Cleaver and Fitzmaurice, above n 193.

211 Keddell, Cleaver and Fitzmaurice, above n 193.

212 Corntassel, above n 208.

213 Williams, above n 15.

counteract racism and embedding whanaungatanga as a key driver of practice. A deeper description of each of these changes is beyond the scope of this article, but they are mentioned here as an illustration of just how extensive the shifts would need to be.

For these changes to succeed, two things must be kept in focus. The first is the thousands of tamariki and whānau who are currently in contact with the child protection system and need support from that system, despite its flaws, right now. While long-term transformation is necessary, this cannot mean abandoning those tamariki and whānau in the meantime. Throughout this article I have tried to keep those tamariki and whānau in focus, with the identification of mana as an overarching principle intended to continue that focus. Secondly, however, reform must be tied to a longer vision. The history of child protection reform in Aotearoa New Zealand in the last 30 years is one of incremental change without sufficient attention to the big picture. Too often a choice is presented between incremental change and radical transformation. This is a false dichotomy as we can, and must, prioritise both. The identification of rangatiratanga as the second overarching principle is intended to achieve those dual objectives. Those tikanga, alongside wānanga, whānau, whakapapa and whanaungatanga, can collectively help to effect the changes required in both the short and the long term, liberating the system from the immobilisation caused by continuous cycles of review.

Understanding these issues through a lens of decolonisation can highlight where urgent change is required, and applying these ideas to law, policy and practice can help to illustrate the range of interdependent changes required to effect a paradigm change. Decolonisation does not just mean that we start doing new things; it also means that we stop doing old ones. It means examining the structures which have disadvantaged Māori in the past, even if they may seem innocuous at surface level. In a child protection context, that includes disestablishing FGCs in favour of wānanga, and reducing (or eliminating) the use of non-Indigenous legal frameworks such as the UNCRC. There are Indigenous alternatives to these frameworks which will better serve the long-term goals of decolonisation and Indigenous self-determination, without losing sight of the short-term need to support tamariki and whānau, and listen to their voices. The FGC may once have been the jewel in the Crown of the child protection system, but it is time to move beyond a system in which the Crown is at the centre.

Kaupapa Māori legal theory can be a tool to help guide those changes, highlighting that while incorporating tikanga into Western law has potential benefits, it also carries risks. Māori scholars hold a wide range of views on those benefits and risks, but what they agree on is that tikanga-based legal changes will only benefit Māori if they effect a transfer of power away from the Crown. Attempts to incorporate tikanga in law, therefore, must pay attention to how such changes transfer power to Māori and enable rangatiratanga. Ultimately, these are broader questions of constitutional transformation. Nevertheless, events of the last few years have reinforced the need for kaupapa Māori-based child protection reform. Conversations about constitutional reform should and will continue. Given the centrality of tamariki and whānau Māori to collective Māori aspirations, child protection reform could be one place to start.