

CARE OF CHILDREN ACT 2004: CONTINUATION OF CULTURAL ASSIMILATION

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This article argues that the cultural assimilation of Māori family forms, originating in colonial private family laws, continues under the Care of Children Act 2004 (COCA). It finds that the opportunity to draft a law that was respectful of tikanga Māori and te Tiriti o Waitangi was lost when legislators ignored all the critiques of the operating principles and processes of the Pākehā legal system, provided by Māori during the 1980s and 1990s. The article argues that cultural assimilation continues through court decisions, since COCA principles require priority to be given to parents, with a corresponding marginalisation of whānau, hapū and iwi. The article concludes that incremental reform would be unlikely to achieve legislation that is fit for a bicultural Aotearoa New Zealand. It advocates for a transformational Māori-led family law reform process, guided by te Tiriti o Waitangi/the Treaty of Waitangi and by tikanga Māori.

I INTRODUCTION

The Care of Children Act 2004 (COCA) is a monocultural law. It continues the statutory cultural assimilation of Māori family forms begun by Aotearoa's colonial guardianship laws. To reimagine family laws fit for a bicultural Aotearoa, incremental change will not be enough: transformational reform is required.

Part II of this article argues that legal assimilation of Māori family forms began through the imposition of colonial guardianship law, crystallising in the Guardianship Act 1968. The colonising private family law regarded the Western nuclear family as the only appropriate family form with which the law should be concerned. The colonial concept of guardianship, which privileged the Western nuclear family form, was central to that colonial law. By privileging the nuclear family, the colonising private family law marginalised and disrespected te ao Māori and tikanga Māori.

Part III argues that legal assimilation has continued, through the enactment and application of COCA. The reform process which led to COCA was a missed opportunity: the parliamentary process

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did not adequately engage with Māori concerns and the provisions of COCA reproduced and reinforced the privileged position of parents and the nuclear family in Aotearoa's private family law. References in COCA to culture and to whānau, hapū and iwi are limited, and an analysis of some cases which deal directly with these matters indicates that it is almost impossible for decision-makers to escape the law's privileging of the rights and interests of parents. Tikanga Māori values, such as whakapapa and whanaungatanga, are not allowed to take precedence over the value that both parents should have primary responsibility for their children.

Part IV considers the possibility of reform of COCA, to begin to develop bicultural private family law for Aotearoa. It finds that whilst incremental reforms could remove the most egregious breaches of tikanga Māori, they would not disrupt the continuing prioritisation of the nuclear family form and the disrespect and denigration of Māori family forms and decision-making processes embedded in COCA. Since piecemeal reform would be unlikely to achieve family law legislation that is fit for a bicultural Aotearoa, this article concludes by advocating for a Māori-led family law reform process, guided by te Tiriti o Waitangi/the Treaty of Waitangi and by tikanga Māori.

II COLONIAL GUARDIANSHIP LAWS: ASSIMILATION OF FAMILY FORMS

The original guardianship law imposed on Aotearoa was colonial law, which regarded the Western nuclear family as the only appropriate family form with which private family law should be concerned. The colonial concept of guardianship, which privileged the rights and interests of parents, was central to colonial law. The effect of the imposition of colonial guardianship laws on Aotearoa was legal assimilation of family forms into the Western nuclear family model, which resulted in tikanga Māori being ignored and Māori family forms being disrespected and regarded as inferior.

A Colonising Processes and Concepts

... the maintenance of customary preference in law came to be regarded not as a constitutional right, but as something to be conceded to meet particular exigencies, and then done away with as soon as possible, to advance the assimilation of Maori people into Western society, and to have but one law for all people.¹

The one law which was imposed in the settler state of Aotearoa New Zealand, in respect of private family law in the 19th century, was English law – generally now referred to as "the second law" of

1 Ministerial Advisory Committee *Puao-te-ata-tu: The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (Department of Social Welfare, June 1986) at 20 (appendix).

Aotearoa New Zealand.² The first law of Aotearoa was tikanga Māori,³ "a law that served the needs of tangata whenua for a thousand years before the arrival of tauīwi".⁴ The second law was based on underlying values that were completely different from those of tikanga Māori.⁵

English law was imposed in two ways. First, English statute and common law in existence on 14 January 1840 was applied by the English law Acts.⁶ Secondly, under the New Zealand Constitution Act 1852, the colonial legislature was given power to "make laws for the peace, order and good government of *New Zealand*, provided that no such laws be repugnant to the law of *England*".⁷

Early colonial laws concerned with families recognised Māori custom in limited ways. Those entitled to succeed to land on the death of a Māori person were to be determined "according to the Native custom".⁸ Māori customary marriages were recognised in very limited circumstances.⁹ Acknowledgement of different ways of thinking about relationships was, however, short-lived. One of the most pervasive and damaging English law concepts was the concept of land as individual title.¹⁰ Arguably, the doctrine of *parens patriae* and the concept of guardianship were equally damaging. Through *parens patriae*, the Crown wielded power and authority to make decisions about those who were "fit" to act as guardians for children. Through guardianship, the rights of parents and the superiority of the Western nuclear family form were confirmed.

1 *Parens patriae*

There could be no more fitting concept than that of *parens patriae* on which to base colonising family law. *Parens patriae* translates as "parent of the nation". It evolved early in English common

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- 2 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1.
 - 3 See Ani Mikaere "Tikanga as the First Law of Aotearoa" (2007) 10 Yearbook of New Zealand Jurisprudence 24.
 - 4 Ani Mikaere *He Rukuruku Whakaaro: Colonising Myths – Māori Realities* (Huia Publishers, Wellington, 2011) at 208.
 - 5 Williams, above n 2.
 - 6 English Acts Act 1854; and English Laws Act 1858. For discussion of the legal foundations of colonial rule in Aotearoa New Zealand, see Jacinta Ruru, Paul Scott and Duncan Webb *The Aotearoa New Zealand Legal System: Structures and Processes* (7th ed, LexisNexis, Wellington, 2022) at ch 3.
 - 7 New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict c 72, s 53 (emphases in original). The long title of the legislation refers to "a Representative Constitution to the Colony", but the right to vote required individual ownership of land. Māori who owned land communally could not vote for the "representative" assembly.
 - 8 Intestate Native Succession Act 1876, s 3.
 - 9 Native Land Act 1909, s 140(5) allowed recognition of a native "widow" for the purposes of succession.
 - 10 MPK Sorrenson "Land Purchase Methods and their Effects on Maori Population, 1865–1901" (1956) 65 The Journal of the Polynesian Society 183.

law, when the developing equitable jurisdiction recognised the monarch's ability, under the prerogative power, to grant relief or remedies to those who could not act in law for themselves, due to various disabilities including non-age.¹¹ The monarch and the Court exercised that prerogative power through the equitable jurisdiction of the Court of Chancery.¹² In 1898, the English common law on *parens patriae* was judicially described as:¹³

... not a jurisdiction to determine rights as between a parent and a stranger, or as between a parent and a child. It was a paternal jurisdiction, a judicially administrative jurisdiction, in virtue of which the Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent.

The applicability of the *parens patriae* doctrine to Aotearoa New Zealand embodied the racist assumptions of superiority inherent in colonisation. Te Tiriti o Waitangi, the reo Māori document signed by most Māori rangatira,¹⁴ guaranteed tino rangatiratanga – supreme power and authority – over kāinga, taonga and whenua.¹⁵ That guarantee was ignored. Instead, the colonisers took art 1 of the Treaty of Waitangi to mean that the monarch, the Queen of England, had supreme power and authority over all of te ao Māori. Imposition of the *parens patriae* doctrine embodied this paternalistic, colonising thinking.

Under the *parens patriae* doctrine, courts had a right *and duty* to intervene when the welfare of a child was said to be at risk. The first assumption was that the courts were the appropriate places to make decisions about children. The *parens patriae* jurisdiction was expressly preserved in legislation which encapsulated the protective jurisdiction of the courts.¹⁶ The second assumption was that the most important decision-maker in respect of any child was the parent (in England, the father). Courts made decisions on behalf of the monarch, the "parent of the nation", where the legally recognised parent could not. Inherent in this assumption was the belief in the primacy of parental authority and the universality of the Western nuclear family form.

11 For an entertaining and persuasive argument that the extension of the jurisdiction to children was originally based on a printer's error (use of the word "enfant" instead of "ideot" in a report of an early case), see Lawrence B Custer "The Origins of the Doctrine of *Parens Patriae*" (1978) 27 Emory LJ 195.

12 For a useful history of the doctrine and its relationship with wardship, see John Seymour "Parens Patriae and Wardship Powers: Their Nature and Origins" (1994) 14 OJLS 159.

13 *The Queen v Gyngall* [1893] 2 QB 232 (CA) at 239.

14 Te Tiriti o Waitangi was signed initially at Waitangi on 6 February 1840 by approximately 46 rangatira and by over 450 more rangatira elsewhere in the following months: Mikaere, above n 4, at 129.

15 Te Tiriti o Waitangi 1840, art 2.

16 See Care of Children Act 2004, s 13(2), dealing with guardianship disputes:

... the High Court continues to have all the powers in respect of the persons of children that the High Court had immediately before the commencement, on 1 January 1970, of the Guardianship Act 1968.

2 *Guardianship*

If the "signature" colonising approach of *parens patriae* was the belief that the Crown had a right to make decisions about children, the "signature" colonising approach inherent in guardianship was the privileging of the Western nuclear family form. Parents had elevated status and were the foundations of the nuclear family.

The concept of guardianship made an early appearance in Aotearoa New Zealand in the Infants Guardianship and Contracts Act 1887 (the 1887 Act), which provided that, on the death of a child's father, the mother would be guardian, acting alone or with anyone appointed by the father.¹⁷ The mother could appoint a guardian to act when she died¹⁸ and an order for custody of a child could be made on the application of the mother.¹⁹ Early family legislation has been regarded as progressive²⁰ due in part to its early divergence from the English family law position of recognising the father as sole guardian of the children. It is true that the 1887 Act provided for equality of guardianship status between mothers and fathers. However, it privileged the nuclear two-parent family and vested all rights and powers over children in legal guardians:²¹

Every guardian under this Act shall have all such powers over the estate and the person, or over the estate (as the case may be), of an infant as any guardian appointed by will or otherwise now has in England ...

The Infants Act 1908 brought together private and public law provisions relating to children. Part I reproduced the 1887 provisions relating to guardianship and custody and, for the first time, the matter of where the child lived and whom they saw was explicitly linked to guardianship. Private and public family law provisions were decoupled in 1925 and 1926 and private family law was restated in the Guardianship of Infants Act 1926.²² The basic model of parenthood (binary, both parents as guardians) – and of guardianship as a bundle of powers and duties given to parents – was re-enacted. The binary model of parenthood was uncritically applied; the only difference in its application in Aotearoa was the removal of the English common law bias towards the father, as sole guardian.

The Guardianship Act 1968 (the 1968 Act) explicitly endorsed the nuclear family, with parents as the primary holders of powers and duties in respect of children. Under the heading "Natural

17 Infants Guardianship and Contracts Act 1887, s 3.

18 Section 4.

19 Section 6.

20 See for example BD Inglis *New Zealand Family Law in the 21st Century* (Thomson Brookers, Wellington, 2007) at [2.2].

21 Infants Guardianship and Contracts Act, s 5.

22 Guardianship of Infants Act 1926, s 1(1).

Guardianship", the 1968 Act stated that the mother and the father should each be guardian of the child.²³ "Guardianship" was defined as:²⁴

... the custody of a child (except in the case of a testamentary guardian and subject to any custody order made by the Court) and the right of control over the upbringing of a child ...

The 1968 Act continued the assumption that "family", for the purposes of decision-making about children, meant "parents". Parental claims were subject to the overarching standard of "the best interests of the child" and the 1968 Act added an additional consideration: the wishes of the child.²⁵ The privileging of the nuclear family was arguably completed through the joint operation of the 1968 Act and the Status of Children Act 1969. Ullrich has observed:²⁶

The joint operation of these two statutes ... has had the effect of tying the legal duty of parenthood to the biological fact of parenthood while reserving the rights which used to flow from the relationship of legitimate children with their fathers to those parents who also have legal status as guardians.

Parents – mothers and fathers and those whom the law recognised as parental substitutes – were, by 1968, firmly established as the building blocks of private family law in Aotearoa.

B Assimilation into the Nuclear Family Form

The private family law of Aotearoa, embodied by the 1968 Act, was based on the norm of the Western nuclear family form. This reflects the construction of legal regulatory regimes in all settler states, which took from English law and colonial settler societies the norm of the nuclear family form.²⁷ It is important to be clear about the implications of establishing a family "norm" in a family law statute. Family law decision-makers will inevitably compare relationships presented to them with the idealised nuclear family:²⁸

... relationships and family forms are considered by law in light of this idealised image of the nuclear family and are granted recognition as "family" based upon the extent to which they are understood as resembling that archetypal family.

23 Guardianship Act 1968, s 6(2).

24 Section 3.

25 Section 23(2).

26 Vivienne Ullrich "Parents at law" (1981) 11 VUWLR 95 at 96.

27 See Richard Phillips "Settler colonialism and the nuclear family" (2009) 53 *The Canadian Geographer/Le Géographe Canadien* 239 for a discussion of the operation of the nuclear family concept in Canadian law.

28 Alan Brown *What is the Family of Law? The Influence of the Nuclear Family* (Hart Publishing, Oxford, 2019) at 20, discussing continuing reference to the hegemonic concept in English family law.

Not only does this lead to "different" families being treated with suspicion, but it also allows family law to privilege and value one type of societal organisation over all others. Analyses of colonising societies and legal regimes confirm that the effect of elevating and privileging the Western nuclear family form is to impose a single global family law narrative, structured and populated by European perspectives,²⁹ while at the same time "efforts to universalize the nuclear family model obscure the violent colonial history of this institution".³⁰

In settler states, the effects of colonising legislation which renders indigenous family structures invisible have been recognised as damaging to indigenous societies:³¹

Race and gender are social constructions and are not only a product of colonization, but a requirement since the oppression of one group over another relies upon the creation of inequality. ... While all Aboriginal people experienced the effects of colonization, Aboriginal women faced more extreme effects as sexism and racism combined to oppress and marginalize them.

In relation to disruption caused by colonisation and the imposition of the nuclear family model on Māori society, Mikaere notes:³²

The disruption of Māori social organisation was no mere by-product of colonisation, but an integral part of the process. Destroying the principle of collectivism which ran through Māori society was stated to be one of the twin aims of the Native Lands Act which set up the Native Land Court in 1865, the other aim being to access Māori land for settlement ... Whānau were eventually forced to break into nuclear families and move to towns and cities in search of work ... [t]he deliberate destruction of whānau and hapū structures and the forcing of Māori women away from their whānau and into the Pākehā model of the nuclear family left them vulnerable in a host of ways.

Private family law, as embodied in the 1968 Act, ignored te ao Māori and devalued Māori ways of organising families. Donna Hall and Joan Metge, writing in 2002, identified the 1968 Act as one of several private family law statutes which "attack or ignore Māori beliefs and practices regarding the

29 Ann Laura Stoler *Race and the Education of Desire: Foucault's History of Sexuality and the Colonial Order of Things* (Duke University Press, Durham (NC), 1995).

30 Haley McEwen "Inventing Family: Colonial Knowledge Politics of 'Family' and the Coloniality of 'Pro-family' Activism in Africa" (2021) 67 *Africa Today* 31 at 42.

31 Wendee Kubik, Carrie Bourassa and Mary Hampton "Stolen Sisters, Second Class Citizens, Poor Health: The Legacy of Colonization in Canada" (2009) 33 *Humanity & Society* 18 at 20 and 21.

32 Ani Mikaere *The Balance Destroyed* (Te Tākupu, Te Wānanga o Raukawa, Ōtaki, 2017) at 101 and 103.

family".³³ They criticised the Act's assumptions that parents had natural rights to make decisions about children to the exclusion of others:³⁴

... it is assumed that the family, the ideal form to be protected and promoted by law, is the nuclear family consisting of a man and a woman married to each other and the immature children under their care and control. ... This definition of the family is taken so entirely for granted that the concept [of] family is not defined in any of these family laws and other family types are not mentioned, even to be rejected.

By ignoring te ao Māori family forms and privileging the nuclear family, private family law embraced colonial ideals and denigrated te ao Māori, tikanga Māori and Māori family forms.

III CARE OF CHILDREN ACT 2004: CONTINUING CULTURAL ASSIMILATION

One of the most pervasive forms of cultural racism is the assumption that Pakeha values, beliefs and systems are "normal". This places Maori values, beliefs and systems in the category of "exotic". Provision for Maori cultural preference thus become [sic] an "extra". That which sees provision for Maoritanga as anything other than a normal ingredient of our national culture is essentially culturally racist.³⁵

This Part argues that cultural assimilation has continued through the Care of Children Act. The extensive Māori critiques of both family law and the processes of Aotearoa's legal system are traversed, to identify the key messages given by Māori to policymakers and legislators. An examination of the reform process which led to the enactment of COCA then finds that it was a missed opportunity to change the existing monocultural law. The parliamentary process did not adequately engage with Māori concerns and the provisions of COCA reproduced and reinforced the privileged position of parents and the nuclear family in Aotearoa's private family law. Finally, this Part analyses some COCA cases which directly considered the meaning of culture and identity. The analysis finds that the courts were unable to apply these concepts to give precedence to tikanga Māori values and Māori family forms. COCA principles subordinated respect for identity, whānau, hapū and iwi to rights of parents, even where circumstances suggested this was not in the best interests of the Māori child.

33 Donna Hall and Joan Metge "Kua Tutū Te Puehu, Kia Mau: Māori aspirations and family law" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (2nd ed, LexisNexis Butterworths, Wellington, 2002) 41 at 48.

34 At 48–49.

35 Ministerial Advisory Committee, above n 1, at 25 (appendix).

A *Māori Perspectives and Critiques*

The task of seeking to explain Māori concepts of guardianship, custody and access is, inevitably, a complex one. These concepts are creations of Western law and as such have been born from a particular philosophical base. The Māori philosophical base is quite different.³⁶

In the 36 years between the enactments of the Guardianship Act and the Care of Children Act, there were many important Māori critiques of laws and legal processes in Aotearoa. *Puao-te-ata-tu* – the seminal report critiquing public family law care and protection measures – was published in 1986. The New Zealand Law Commission working paper *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* was released in 1996.³⁷ The Ministry of Justice commissioned and published Māori research into the operation of guardianship laws, *Guardianship, Custody and Access: Māori Perspectives and Experiences*, in 2002.³⁸

In addition to these family law critiques, there were three volumes of the *Report of the Royal Commission on Social Policy*, which included the papers *Ngā Tikanga me ngā Ritenga o te Ao Māori* (Standards and Foundations of Māori Society) and *Te Reo o te Tiriti Mai Rano* (The Treaty Always Speaks).³⁹ Several critiques addressed justice processes, including Family Court processes. The Ministry of Justice project *He Hīnātore ki te Ao Māori* explored traditional Māori perspectives on justice.⁴⁰ *Te Whaingā i te Tika: In Search of Justice* called for legal services in Aotearoa to reflect the bicultural heritage of the country.⁴¹ The Law Commission report *Justice: The Experiences of Māori Women* presented Māori women's experiences and critiques of monocultural court processes.⁴²

The following discussion identifies some of the themes which emerged consistently and strongly from these Māori critiques.

36 Di Pitama, George Ririnui and Ani Mikaere *Guardianship, Custody and Access: Māori Perspectives and Experiences* (Ministry of Justice, August 2002) at 19.

37 Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996).

38 Pitama, Ririnui and Mikaere, above n 36.

39 Royal Commission on Social Policy *The April Report: Report of the Royal Commission on Social Policy, Volume III, Part One: Future Directions – Associated Papers* (April 1988) at 3 and 79.

40 Ministry of Justice *He Hīnātore ki te Ao Māori: A Glimpse into the Māori World* (March 2001).

41 Advisory Committee on Legal Services *Te Whaingā i te Tika: In Search of Justice* (Department of Justice, 1986).

42 Law Commission *Justice: The Experiences of Māori Women* (NZLC R53, 1999).

1 *Te Tiriti o Waitangi/The Treaty of Waitangi*

The Law Commission working paper *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* began with the Treaty of Waitangi:⁴³

For Māori, the Treaty of Waitangi is the arbiter of all relationships between Maori and the Crown ... Maori believe that rangatiratanga and other words in the Treaty directed the Crown to respect Maori autonomy and control which would include the continuation of their set of laws which were already in place before European settlement.

Volume II of the report of the Royal Commission on Social Policy opened by stating that the commissioners had regarded it as:⁴⁴

... fundamental ... to recognise from the outset that the Maori dimension is basic to New Zealand society and this must have profound implications for all social policy. That area of inquiry was given the title *The Treaty of Waitangi: Directions for Social Policy*, reflecting the significance of the Treaty as a basic constitutional document of general application in the life of the nation.

The Royal Commission endorsed the two key recommendations from the paper by Māori women: that the Treaty of Waitangi should be recognised as the foundational constitutional document; and that whānau, hapū and iwi structures should be strengthened and developed, to allow whānau to care for and protect their members and for the mana of Māori women to be restored.⁴⁵

In *Te Whaingā i te Tika: In Search of Justice*, the Advisory Committee on Legal Services quoted one submitter who said "[l]egal services should work from a base line philosophy of Te Tiriti o Waitangi, which should be recognised as part of the Legal Services Act".⁴⁶ In many submissions from Māori, justice was equated with recognition of Māori as tangata whenua and honouring the guarantees in te Tiriti o Waitangi.⁴⁷ The Law Commission report *Justice: The Experiences of Māori Women* similarly found that Māori women who were clients and users of justice sector services grounded their understandings of "justice" in te Tiriti o Waitangi and from Māori cultural values.⁴⁸

43 Law Commission, above n 37, at [7].

44 Royal Commission on Social Policy *The April Report: Report of the Royal Commission on Social Policy, Volume II: Future Directions* (April 1988) at 3.

45 At 21.

46 Advisory Committee on Legal Services, above n 41, at 4.

47 At 4.

48 Law Commission, above n 42, at xix.

2 *Collective identity*

The literature review in *Guardianship, Custody and Access: Māori Perspectives and Experiences* began with the Māori creation stories. The stories showed that all Māori are connected to each other and the world around them, through whakapapa.⁴⁹

Whakapapa is central to Māori life. It is whakapapa that ensures the interconnectedness of all living things, therefore creating the imperative to maintain a state of balance at all times. ... The concept of whanaungatanga (the root word of which is whānau, meaning kin group and also to be born) is similarly crucial to Māori existence.

Māori writing emphasised the central importance of grandparents and other older relatives to developing and sustaining the identity of a Māori child:⁵⁰

Elderly people, as repositories of cultural knowledge, play an integral part in ensuring and assisting in the development of a Māori child's knowing who he or she is. This is a form of understanding which extends beyond knowing your genealogy, to including knowing your own history as told by your own people, being skilful in your own language, recognising the nuances of your culture that make you different from one another, and owning a world view that is distinctly Māori.

Privileging of the child's relationship with the birth parents and recognising only that relationship under guardianship law undermined Māori principles of child-rearing:⁵¹

The valuing of children as links in the chain of descent is not necessarily upheld by the prioritising of birth parents' rights. It is generally older relatives who provide that kind of education and knowledge to children. In cases where a non-custodial Māori parent has access, the opportunities for other relatives from that side of the whānau to provide such information may be extremely limited, or even non-existent.

Ngā Tikanga me ngā Ritenga o te Ao Māori emphasised that Māori identity was founded in "three closely bound entities" – whānau, hapū and iwi.⁵² Whānau was the basic unit of Māori society; whanaungatanga – described in the paper as the desire and necessity to strengthen kinship ties – was the "basic cultural value".⁵³

49 Pitama, Ririnui and Mikaere, above n 36, at 22.

50 Marie McCarthy "Raising a Māori Child Under a New Right State" in Pania Te Whāiti, Marie McCarthy and Arohia Durie (eds) *Mai i Rangitātea: Māori Wellbeing and Development* (Auckland University Press, Auckland, 1997) 25 at 29.

51 Pitama, Ririnui and Mikaere, above n 36, at 40.

52 Royal Commission on Social Policy, above n 39, at 11.

53 At 14.

Every discussion of Māori social organisation confirmed the central importance of whānau. In relation to succession law, Hohepa explained:⁵⁴

... the crucial social unit for Maori is the *whaanau*, the cluster of families and individuals descended from a fairly recent ancestor. Its members have close personal, familial and reciprocal contacts, decision making and relationships with each other. Its importance for discussing and settling familial issues ranging from child upbringing to succession but across a larger kin range gives it an almost identical function to that of the legally recognised nuclear family ...

Puao-te-ata-tu described the collective identity of the child:⁵⁵

The Maori child is not to be viewed in isolation, or even as part of [sic] nuclear family, but as a member of a wider kin group or hapu community that has traditionally exercised responsibility for the child's care and placement.

Justice: The Experiences of Māori Women found that women consulted about justice processes emphasised the importance of whānau, which was "not just about Western notions of the nuclear family".⁵⁶

3 *Tikanga Māori*

Professor Hohepa explained the imperative for private family law reform to respect tikanga Māori:⁵⁷

Tikanga is central, relying on a collective sharing of decision making, tied to the community, and differs from the law which exists today which is tied to a world of individualism.

He Hīnātore ki te Ao Māori discussed the creation myths and their importance, in containing the origins of tikanga Māori. The stories showed how principles such as mana, tapu and utu were adhered to, and illustrated the central importance of kaumatua and kuia for mokopuna.⁵⁸ The literature review in *Guardianship, Custody and Access: Māori Perspectives and Experiences* also began with the Māori creation stories and identified themes relevant to decision-making about Māori children, particularly the role of kuia. The importance of collective decision-making, with the collective good prevailing, emerged clearly.⁵⁹

54 Law Commission, above n 37, at [57] (emphasis in original).

55 Ministerial Advisory Committee, above n 1, at 29.

56 Law Commission, above n 42, at 29.

57 Law Commission, above n 37, at [56] (emphasis in original).

58 Ministry of Justice, above n 40, at 9.

59 Pitama, Ririnui and Mikaere, above n 36, at 21.

Puao-te-ata-tu had found that neither public law principles nor decision-making processes were in accordance with tikanga Māori:⁶⁰

We do not think cases involving Maori children ought to be determined solely in accordance with Western priorities, or that those who do not have a Maori experience or training, are adequate arbiters or advocates of the best interests of the Maori child.

Guardianship, Custody and Access interviewees were critical of procedures in the Family Court. Family law clients explained:⁶¹

In the Family Court I wasn't allowed to have any whānau with me – and that was like – it was terrible. I had my mum and she had to sit outside. She had come to support me and she wasn't allowed in ...

...

I was annoyed, frankly, that in both the judicial conference and the mediation hearing there had been no consultation about having anyone to support me ...

Te Whaingā i te Tika: In Search of Justice found the Family Court culturally alienating:⁶²

We urge that immediate attention be given to Family Court structures, procedures and values.

...

We strongly recommend a whānau approach to matters affecting Maori children or families which would replace the present intimidating, individualised mono-cultural Family Court structure.

Māori critiques and experiences of law and legal processes gave some clear and consistent messages for those considering reform of laws for families in Aotearoa:

- start with the promise made to Māori in te Tiriti o Waitangi, to respect tino rangatiratanga over kāinga, taonga and land;
- ensure that the law does not continue to value and recognise only the nuclear family;
- develop principles which reflect the importance of whānau, hapū and iwi for the development and well-being of tamariki Māori; and
- use decision-making processes which respect tikanga Māori.

B Enacting COCA: A Missed Opportunity

A wealth of Māori knowledge and experience existed, on which the Government could have drawn in reforming existing guardianship law, particularly the Government's own Ministry of Justice-

60 Ministerial Advisory Committee, above n 1, at 24 (appendix).

61 Pitama, Ririnui and Mikaere, above n 36, at 68 and 80.

62 Advisory Committee on Legal Services, above n 41, at [1.3] and [1.5].

commissioned research *Guardianship, Custody and Access: Māori Perspectives and Experiences*.⁶³ Reform presented an opportunity to change the existing monocultural law. The reform process began in August 2000 with the release of a discussion paper, *Responsibilities for Children: Especially when parents part – The Laws About Guardianship, Custody and Access*.⁶⁴ The paper indicated that cultural diversity was an aim of the law, along with respect for children's rights. The accompanying press statement commented:⁶⁵

The Government wants to ensure that there is no unjustified impediment to continuing active family involvement by fathers and the extended family. We need to place greater emphasis on parenting relationships within an overall framework which preserves the paramountcy of the rights of the child.

The discussion paper focused on parents' rights – especially fathers' rights – and the rights of children as individual rights-holders. The relevance of Māori values and family forms was framed in the *Summary Analysis of Submissions* in this way:⁶⁶

In addition, the international community, New Zealand society and legislation now place greater emphasis on children's rights and on the needs and rights of minority and indigenous peoples. Recent New Zealand legislation concerning families (such as the Children, Young Persons, and Their Families Act 1989) incorporates concepts of bi-culturalism and children's rights and recognises diverse family forms.

The discussion paper invited comments on four "issues about the current law": modernising language; children and young people's rights; rights and responsibilities of parents; and recognition of wider family.⁶⁷ The Western nuclear family form was assumed to be the appropriate starting point. The "wider family" was an afterthought – the "extra" warned about in the *Puao-te-ata-tu* quote which opened this Part.

The *Summary Analysis of Submissions* made clear that the Government viewed the content of the 359 submissions as a snapshot of public opinion that would guide its next steps.⁶⁸ Issues on which there was general agreement would be progressed; those on which there was disagreement would not. There was general agreement that guardianship law should focus on ensuring the best interests of

63 Pitama, Ririnui and Mikaere, above n 36.

64 Original policy statements and questions asked can be extrapolated from the published summary: Ministry of Justice *Summary Analysis of Submissions in Response to the Discussion Paper Responsibilities for Children: Especially when parents part – The Laws about Guardianship, Custody and Access* (October 2001).

65 Hon Steve Maharey MP "Discussion paper on guardianship custody and access arrangements released" (press release, 15 August 2000).

66 Ministry of Justice, above n 64, at 6.

67 At 11.

68 At 8.

children and young people and that both parents should play a significant role in children's lives.⁶⁹ The *Summary Analysis of Submissions* noted "[t]here was ... disagreement about whether Māori aspirations and values require special attention under the law".⁷⁰

Of the 359 submissions, only three referred directly to te ao Māori: Te Puni Kōkiri considered that the law needs to recognise wider whānau/family;⁷¹ a judge said that cultural issues could be brought to the court through a cultural report;⁷² and at least one respondent suggested that an alternative dispute resolution process for Māori in the Family Court might be appropriate.⁷³ Six submissions referred to the Treaty of Waitangi: four gave general support; one questioned the validity of referring to the Treaty at all; and one stated that the issue of Māori sovereignty was relevant only to Māori children.⁷⁴

The overwhelming impression given by the *Summary Analysis of Submissions* is that Māori concepts of child-rearing, family organisation and decision-making were thought irrelevant to the matters being considered in the proposed legislation. This dismissal of te ao Māori is uncomfortably and unpleasantly demonstrated in one statement:⁷⁵

A few submissions specified Māori terms and concepts that could be included in the legislation. These included:

...

- whakatauki meaning adult responsibilities, broader than just parents' responsibilities.

The summary used the term "whakatauki", whereas the original submission used the term "whanaungatanga". Those collating the summary showed no understanding of, or respect for, te ao Māori or tikanga Māori principles. This careless note contrasted with the careful examination of responses about the rights of children and young people, which occupied three pages of the document.

The *Summary Analysis of Submissions* indicated that there was no strong will to reform private family law to make it more culturally responsive:⁷⁶

69 At 4.

70 At 4.

71 At 16.

72 At 14.

73 At 37.

74 At 19. The clear implication was that the discussion paper and the submissions were not primarily concerned with whānau Māori.

75 At 22.

76 At 30.

A number of submissions generally agreed that Māori values and aspirations need special attention and that the Act needs to reflect Treaty of Waitangi obligations. Almost an equal number of submissions held another view – that all families should be treated the same way – the same responsibilities and rights apply within all families.

When the Care of Children Bill was introduced to Parliament on 10 June 2003, neither it nor the explanatory note accompanying it mentioned te Tiriti o Waitangi or tikanga Māori values. Nonetheless, the explanatory note stated – as the original discussion document had – that one of the objectives was to "recognise the diversity of family arrangements that exist for the care of children".⁷⁷ Introducing the Bill, the Hon Lianne Dalziel stated:⁷⁸

We can debate the merits of diverse families for as long as we like, but it is utterly and completely meaningless when we pretend that it would be all right to exclude family relationships that exist in fact, but that some people would prefer did not.

Metiria Turei, supporting the Bill, explained the importance of a broader understanding of "families":⁷⁹

The bill does not create artificial families nor does it redefine genders, but rather it recognises the diversity of families that do exist in this country and ensures that the best interests of the child guide the court's recognition of the responsibilities of the adults who surround that child. Those adults may be the child's biological parents, or they may be step-parents, same-sex parents, grandparents, and other near relatives. The bill clarifies their respective legal responsibilities to the child where the family, for whatever reason, breaks down.

The "family breakdown" with which the Bill was concerned was parental separation. Debates focused on expanding the existing definition of the nuclear family beyond the foundational heterosexual intimate parental partnership. The references in the debates to "other" family members were almost always to "near" or "close" relatives:⁸⁰

It is crucial that the close adults in the child's life are clear about their respective responsibilities, and that those responsibilities are truly reflected in the reality of the child's relationships with those adults. No law that attempts to mend the damage from the breakdown of a family will fit each family's circumstances perfectly, but, in our view, this bill at least recognises the realities of children's lives, and the diversities of the families in which they live.

77 Care of Children Bill 2003 (54-1) (explanatory note) at 25.

78 (24 June 2003) 609 NZPD 6539.

79 (26 June 2003) 609 NZPD 6669.

80 (21 October 2004) 621 NZPD 16426.

Other family members were recognised not for their own intrinsic value in cultural terms, but as individuals who could support children's well-being at the time of parental separation:⁸¹

Particularly in a break-up situation, a child may at times have a much closer and more interdependent relationship with other members of the family at the time of the break-up, for example grandparents or aunts. In those circumstances it may be in a child's best interests that those relationships are given greater emphasis—at least for a period of time.

Contributions on both sides of the parliamentary debates assumed that the nuclear family was – and must be – the starting point of the discussion. Moana Mackey, Labour MP and member of the Justice and Electoral Committee which considered the Bill, put it this way:⁸²

... no matter what family situation children find themselves in, through no fault of their own, we need to make sure that they have all the adequate protections that the children born into traditional nuclear families were granted under the old Guardianship Act.

Throughout the entirety of the parliamentary debates on the Bill, there were only three references to a family form other than the nuclear family. One was made by Metiria Turei, supporting the Bill:⁸³

The Greens are very pleased that the principles in clause 4 do not emphasise specific relationships as such, but the continuity and stability of arrangements for the child, the ongoing cooperation between the adults in the child's life, the impact and value of the broader whānau, hapū, and iwi of the child, and the child's identity and language. We think that this really will help to focus the parties and the courts on what is important for the child's well-being, as much as for the adults and their relationship.

The other two were made by those opposing the Bill, and were used to emphasise the primacy of the nuclear family. Judith Collins stated:⁸⁴

... mum and dad are responsible, or their legally appointed guardian is if they are not there. That is who it must be. Certainly, wider whānau āinga, family, must be there too, but all children are born with a mum and a dad somewhere, and it is those people who must have the primary responsibility for their children. If they do not, nobody, eventually, will be responsible.

Murray Smith noted:⁸⁵

... relationships between the child and members of his or her family, family group, whānau, hapū, or iwi should be preserved and strengthened, and that those members should be encouraged to participate in the

81 (21 October 2004) 621 NZPD 16424.

82 (21 October 2004) 621 NZPD 16430.

83 (21 October 2004) 621 NZPD 16425.

84 (21 October 2004) 621 NZPD 16420.

85 (21 October 2004) 621 NZPD 16429.

child's care, development, and upbringing. That is important, again, with the role of fathers in our society. One of the tragedies of our society is that we have too many absent fathers. Boys are not encouraged into fatherhood and are not encouraged to play their full role as parents, as they ought to be.

Collins's reference to wider "whānau āinga" served to emphasise the primary "family" – the nuclear two-parent family. Smith's reference to a child's relationship with whānau, hapū and iwi seemed a thinly veiled racist reference to Māori fathers' perceived failings in respect of their children.

The fundamental importance of parents – and the relative insignificance of whānau, hapū and iwi – can be seen throughout the parliamentary process which resulted in the enactment of the Care of Children Act.⁸⁶ None of the many Māori critiques of law and legal processes discussed above was raised in debates or during select committee deliberations. No references were made to the cultural significance of whānau, hapū and iwi in decision-making for Māori children, which had been central to the Children, Young Persons, and Their Families Act 1989.⁸⁷ No mention was made of obligations under te Tiriti o Waitangi or of principles and values in tikanga Māori, such as whakapapa and whanaungatanga.⁸⁸ The process did not engage in any meaningful way with te ao Māori or with Māori ways of organising families and making decisions regarding them. The enactment represents a missed opportunity to reform existing monocultural private family law provisions.

C Applying COCA 2004: Continuation of Cultural Assimilation

The Care of Children Act privileges parents, both in process terms and in guiding principles. Parents have automatic standing to be heard on "parenting orders", but whānau or other culturally recognised groups must apply for leave.⁸⁹ This process barrier breaches tikanga Māori and te Tiriti o Waitangi obligations. COCA provides that the welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration in decision-making about children,⁹⁰ taking into account s 5 principles. Section 5 states that "a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians";⁹¹ and that "a child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents [and] guardians".⁹² This prioritises parents' rights and

86 The legislation was given royal assent on 21 November 2004 and came into force on 1 July 2005.

87 The Children, Young Persons, and Their Families Act 1989, now the Oranga Tamariki Act 1989, came into force on 1 November 1989 and made extensive reference to "whānau, hapū, iwi, and family group".

88 Compare Oranga Tamariki Act, s 5(1)(b)(iv), which refers to recognising whakapapa and whanaungatanga responsibilities of whānau, hapū and iwi.

89 Care of Children Act, s 47(1)(d).

90 Section 4(1).

91 Section 5(b).

92 Section 5(c).

obligations. The single COCA provision referencing whānau, hapū and iwi in the context of children's best interests appears in s 5(e). It mirrors the parliamentary debates, which had discussed the importance of near or close relatives for the child at the time of parental separation:

... a child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened ...

The s 5 principles consciously view Māori as one cultural group among many in society, to whom no particular obligations are owed. Section 5(f) states that "a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened".

The only other reference to whānau, hapū, iwi or family group appears when referring to protection of children from all forms of violence.⁹³ Implicating whānau, hapū and iwi in relation to family violence, whilst making no substantive and stand-alone reference to them as groups who are integral to the well-being of tamariki Māori, is fundamentally racist.

For Family Court decisions to recognise and value Māori whānau, hapū and iwi, s 5(e) and (f) would need to be given considerable – and in some cases determinative – weight. The next section of this Part analyses a few decisions under COCA, which specifically dealt with the meaning and application of these provisions. The analysis considers the extent to which those judgments were able to prioritise whakapapa and whanaungatanga over the rights of parents.

1 *Devaluing collective identity and tikanga Māori*

When a child has been placed under a matua whāngai arrangement in accordance with tikanga Māori, it might be expected that, in these COCA cases at least, Māori ways of thinking about and organising families would be respected and supported.

In *PED v MHB*, Judge Coyle conceded that there could be an internal presumption in respect of parents in s 5(b) of COCA, but stated that "in some cases, continuing relationships with both parents may be presumptive but in other cases may not".⁹⁴ The judgment valued the whāngai parents and birth parents equally. A parenting order was made in favour of the whāngai parents.

However, in *DSW v ATTA*, Judge Munro did not give particular weight to whanaungatanga or identity derived from the elder child's having been whāngai to grandparents:⁹⁵

... no one principle assumes priority over the other ... The lack of priority, as was confirmed in *Kacem v Bashir* ... is important in this case because for Mr and Mrs A and Ms P, principle 5(f) assumes a greater

93 Section 5(a).

94 *PED v MHB [Whangai: Final parenting order]* [2012] NZFLR 35 (FC) at [27].

95 *DSW v ATTA* [2013] NZFC 406 at [18].

significance than any of the other principles and the evidence would suggest that they consider that principle to be of greater importance than principle (a), (c) and (d), which emphasises the importance of both of the child's parents in the child's upbringing.

The judgment weighed the competing "claims" of the father and the whāngai parents and found the latter less important:⁹⁶

Unfortunately in this case, the emphasis on the children's identity has been rather at the expense of the involvement of both parents in the children's lives while the children were living with Mr and Mrs A and Ms P.

In *Nikau v Tatchell*, the child had been placed with her aunt and uncle (T) under a matua whāngai arrangement, shortly after birth.⁹⁷ The mother changed her mind and wanted her returned. When the mother subsequently made allegations against the whāngai parents, Oranga Tamariki (OT) became involved. OT relocated the child to live with her maternal grandparents. The birth parents moved to be closer to the child; contact with the whāngai parents (N) ceased. Judge Coyle again emphasised:⁹⁸

... the s 5(b) principle is but one of the s 5 principles that I need to consider, and as with all the principles in the Act it is not automatically determinative, but rather each case needs to be considered on its own merit.

The Court noted that the child's cultural heritage was Māori and that she also had Pākehā heritage; the child was therefore bicultural by birth.⁹⁹ Judge Coyle explained what "preserving and strengthening" culture meant for this particular child:¹⁰⁰

... if a Māori child is to be raised in te Ao Māori that involves an exposure to that world; to tikanga, to te reo and to opportunities to experience life within te Ao Māori. It is a world-view, a way of thinking, and a way of living that is quite different to a Pakeha world-view.

...

[The mother and maternal grandparents] have an incomplete understanding of the Māori world-view of children; [the maternal grandmother] constantly referred to [the child] being "[the mother]'s child" and [the child] as having to be with her mother.

96 At [29].

97 *Nikau v Tatchell* [2018] NZFC 1239, [2018] NZFLR 276.

98 At [71].

99 At [90].

100 At [92] and [93].

The Judge emphasised the relevance of the Treaty of Waitangi when applying s 5 COCA principles.¹⁰¹

The Family Court, in recognition of its Treaty obligations, should embrace te Ao Māori and afford to Māori children, when considering ss 5(e) and (f), a particular and careful focus on ensuring that the relationships as set out in the Act and a child's sense of identity as Māori can be particularly and specially both preserved and strengthened.

The Court appointed the whāngai parents as additional guardians and discharged the parenting order in favour of the maternal grandparents.

Quashing those orders on appeal, the High Court found that Judge Coyle was wrong to emphasise s 5(e) and (f) over s 5(b). Woolford J's judgment noted that the child's heritage was Māori and Pākehā and that "[w]hāngai is informal".¹⁰² The judgment dismissed the tikanga Māori importance of whāngai arrangements, stating: "I am of the view that what was agreed more than eight years ago is of limited relevance to an assessment of [the child's] welfare and best interests now".¹⁰³

The High Court found that Judge Coyle had made an error of law by regarding the principles of preserving and strengthening a child's relationship with whānau, hapū and iwi and their culture as determinative.¹⁰⁴ Woolford J found that s 5(b) of COCA elevated the importance of parents, stating:¹⁰⁵

... the use of the word "primarily" in s 5(b) is significant. Primarily means essentially, mostly, chiefly or principally. In his analysis, however, the Judge did not accord any real weight to this principle. When he was considering the options for [the child's] care, the Judge did not make any specific reference to s 5(b).

The Court of Appeal agreed with Woolford J's assessment that Judge Coyle has been wrong in law:¹⁰⁶

We see no basis to differ from the High Court Judge's assessment that the Family Court judge wrongly applied s 5 ... It is apparent that the Family Court Judge allowed the principles in s 5(e) and (f) to dominate his consideration of the case.

The Court of Appeal's decision confirms that it had been an error of law, in applying COCA principles, to give determinative weight to a child's relationship with whānau, hapū and iwi. The decision in this case continued the cultural assimilation of Māori family forms into the privileged nuclear family.

101 At [102].

102 *Nikau v Nikau* [2018] NZHC 1862 at [21].

103 At [23].

104 At [66].

105 At [48].

106 *Nikau v Nikau* [2018] NZCA 566, [2018] NZFLR 826 at [26] per Winkelmann J.

2 *Devaluing te reo and te Tiriti o Waitangi/the Treaty of Waitangi*

In *Cavanagh v Cavanagh*, the Family Court was asked to determine which school a seven-year-old Māori child should attend.¹⁰⁷ She had been attending a full immersion kura kaupapa Māori and was fluent in te reo. Her mother wanted her to continue to attend that school; her Pākehā father wanted her to attend a different school, preferably a Catholic primary school. Judge Fleming's oral judgment focused on the rights of the father and the fact that the mother knew he did not want the child to attend the full immersion school.¹⁰⁸ The judgment noted:¹⁰⁹

Mr C objects to the child remaining at the school because he feels marginalised and unable to be involved ... [T]he children and the teachers at the school all converse in Māori and Mr C has no understanding of Māori.

Judge Fleming accepted that the current school was the place most likely to support, preserve and strengthen the child's Māori identity, but then stated:¹¹⁰

I also have to have regard to the very important principles contained in ss 5(b) and(c). Mr C clearly feels he is shut out of involvement with the school ... His ability to have any meaningful involvement in his daughter's school life is significantly reduced while she remains at [immersion school].

The Court ordered that the child attend an unspecified "alternative non-immersion mainstream school". On appeal to the High Court, three schools were considered: kura kaupapa Māori, the Catholic state-integrated mainstream school, and a school with three units, one of which was bilingual. Lawyer for child advocated for the bilingual school, which had been considered by the mother originally, but which she did not support on appeal.

The High Court appeal decision made it clear immediately that:¹¹¹

The focus is on what is best for [the child], not for her parents, or either of them. There is obviously, however, some overlap. The child-parent relationship is important, as can be seen throughout the Act, and in particular in s 5.

As the Family Court did, the High Court accepted that the kura kaupapa Māori was the best school for this particular child:¹¹²

107 *Cavanagh v Cavanagh* [2017] NZHC 1546, [2017] NZFLR 701.

108 *Cavanagh v Cavanagh* [2017] NZFC 619 at [14].

109 At [15] and [17].

110 At [14].

111 *Cavanagh v Cavanagh*, above n 107, at [46].

112 At [96] and [97].

I accept s 5(f) has particular importance in the present case. [The child] is a Māori child. She attended a kohanga reo for four years by agreement between both parents. She attended a full immersion Māori school for two years. She is fluent in te reo at the age of seven.

... For reasons that should be obvious from the foregoing, [immersion school] scores the highest in strengthening [the child's] identity. That is not of course true in terms of her Pākehā side, but that is a culture that does not need reinforcement, at least not in the present context.

The High Court also accepted that the child would lose fluency in the bilingual unit,¹¹³ that she wanted to attend the immersion school and that she would be upset by another change.¹¹⁴ Despite this, Hinton J ordered that the child should attend the bilingual unit of the mainstream school. The judgment made clear that concern to find a compromise that would be acceptable to both parents was the deciding factor.¹¹⁵

Considering [lawyer for child and lawyer for the father] are in agreement with [the child's] attending the bilingual unit at [mainstream school] and considering the proposal did come from [the mother] in the first place, it seems to me both parents should be able to live reasonably happily with [mainstream school].

The judgment prioritised and valued the primary responsibility of parents and the importance of ongoing cooperation between them, while devaluing the child's Māori identity.

Before the Court of Appeal in *Nikau v Nikau*, one of the whāngai parents' grounds of appeal was that the High Court failed to apply the principles of the Treaty of Waitangi, to adequately consider the child's Māori identity and cultural heritage or to give particular importance to the preservation and strengthening of whānau relationships. Judge Coyle, as noted above, had referred to the Family Court's duty under the Treaty of Waitangi. The High Court had narrated Judge Coyle's statement, but made no further comment on the relevance or otherwise of the Treaty. The Court of Appeal did not allow an appeal to proceed on this ground:¹¹⁶

[Woolford J] addressed himself to the principles of the Treaty of Waitangi, as those principles find recognition in the Act, and in particular in the principles set out in s 5, specifically s 5(e) and (f).

On the contrary, the High Court had not addressed the principles of the Treaty of Waitangi, except to quote Judge Coyle. For the Court of Appeal to suggest that a discussion of s 5(e) and (f) was in any way equivalent to considering the obligations arising from the Treaty of Waitangi/te Tiriti o Waitangi failed to appreciate both the nature of the s 5 provisions and the obligations under the Treaty/te Tiriti.

113 At [99].

114 At [103].

115 At [101].

116 *Nikau v Nikau*, above n 106, at [28] per Winkelmann J.

Section 5(e) mentions whānau, hapū and iwi only as an "add-on" to parents, whereas te Tiriti/the Treaty requires the Crown to respect tino rangatiratanga over kāinga, as recently discussed by the Waitangi Tribunal, in *He Pāharakeke, he Rito Whakakīkīngā Whāruarua*:¹¹⁷

We see the article 2 guarantee of tino rangatiratanga over kāinga as of particular importance. ... [A] clear appreciation of what that guarantee means is the necessary starting point for an assessment of contemporary Crown policy and legislation for consistency with te Tiriti/the Treaty ... Continuity of chiefly authority over not just land and resources, but also the people is directly guaranteed in the Māori text of te Tiriti/the Treaty.

Respect for tino rangatiratanga over kāinga would require a reversal of the priority given to parents by s 5(b), to recognise the importance of whanaungatanga in tikanga Māori and to give determinative weight, in a particular case involving tamariki Māori, to s 5(e) and (f). The foregoing case analysis shows that the preference for the nuclear family and the rights of parents is so strongly embedded in the legislation that courts have not felt able to accept such a priority being given to te Tiriti o Waitangi or to tikanga Māori. Application of COCA in these cases represents continuing cultural assimilation.

IV REIMAGINING FAMILY LAW FOR A BICULTURAL AOTEAROA

No legal discourse can claim to be bicultural when the law of one of the cultures is ignored.¹¹⁸

While Part III analysed only a few COCA cases, those cases directly addressed the meaning and application of the statutory principles referring to whānau, hapū, iwi and culture. The analysis showed that COCA contains structural barriers to the according of authority, respect and priority to tikanga Māori, whanaungatanga and whakapapa. In the light of that case analysis and the demonstration that previous guardianship law reforms failed to engage in any meaningful way with Māori critiques, this Part asks whether it is possible to develop family law principles and processes which are fit for a bicultural Aotearoa. It explores what those principles and processes might look like and asks whether incremental reforms are likely to deliver them. The Part concludes that transformational rather than incremental reforms are required and advocates for a Māori-led family law reform process, guided by te Tiriti o Waitangi/the Treaty of Waitangi and by tikanga Māori.

A Bicultural Family Law Principles and Processes?

If it is accepted that the broad purpose of legislation is to meet the needs and interests of all the citizens of a bicultural Aotearoa, then COCA is not fit for purpose. Legal biculturalism is increasingly prominent in law reform debates in Aotearoa. Tikanga Māori is being increasingly recognised as an

¹¹⁷ Waitangi Tribunal *He Pāharakeke, he Rito Whakakīkīngā Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021) at 11.

¹¹⁸ Christian Whata "Biculturalism and the Law: The *I*, the *Kua* and the *Ka*" (2018) 26 Wai L Rev 24 at 26.

authoritative source of law.¹¹⁹ The Law Commission has stated that law reform should recognise tikanga Māori, not only to respect guarantees given in te Tiriti/the Treaty, but also to implement the United Nations Declaration on the Rights of Indigenous Peoples.¹²⁰ There is continuing debate about how and in what ways recognition of tikanga Māori might be increased¹²¹ and whether, in recognising and engaging with tikanga Māori, the legal system of Aotearoa merely continues a process of colonisation.¹²² *He Poutama*, published September 2023 by the Law Commission, provides a guide for law and policy practitioners, to encourage authentic engagement with tikanga.¹²³

In family law reform discussions, responses to biculturalism have varied. Adoption law has always been heavily criticised as being anathema to tikanga Māori and disrespectful of whakapapa and whanaungatanga.¹²⁴ Reforms to make existing adoption law more responsive to te ao Māori and to Māori child-rearing practices have been proposed.¹²⁵ The key suggestion for adoption is to include guiding principles which refer to: the preservation of, and connection to, culture and identity; protection of whakapapa; and the recognition of whanaungatanga responsibilities.¹²⁶ Māori have indicated that work on whāngai should be separate from adoption law reform and led by Māori.¹²⁷

In public family law, reforms to the Oranga Tamariki Act 1989 added the principle that:¹²⁸

... mana tamaiti (tamariki) and the child's or young person's well-being should be protected by recognising their whakapapa and the whanaungatanga responsibilities of their family, whānau, hapū, iwi, and family group ...

119 For discussion, see Jacinta Ruru "First Laws: Tikanga Māori in/and the Law" (2018) 49 VUWLR 211; and Carwyn Jones "Lost from Sight: Developing Recognition of Māori Law in Aotearoa New Zealand" (2021) 1 Legalities 162.

120 Law Commission *Te Kōpū Whāngai: He Arotake – Review of Surrogacy* (NZLC R146, 2022) at [3.4(d)]. See *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007).

121 See for example Williams, above n 2; and Mihiata Pirini and Anna High "Dignity and Mana in the 'Third Law' of Aotearoa New Zealand" (2021) 29 NZULR 623.

122 See for example Mikaere, above n 4, at 271, where the author argues that supporting legislative incorporation of tikanga does more to undermine Māori law than operating within existing monocultural models.

123 Law Commission *He Poutama* (NZLC SP24, 2023).

124 For a summary of the criticisms and ongoing issues, see Jessica Macdonald and Madeleine Story "The Adoption Act 1955: The Statutory Guillotine from Tikanga and Whakapapa" (2020) 7 PILJNZ 194.

125 Ministry of Justice *A new adoption system for Aotearoa New Zealand: Discussion Document* (June 2022).

126 At 16–17.

127 The Ministry of Justice website confirms that work on legal recognition of whāngai was not being progressed as part of the adoption law review: see Ministry of Justice "Adoption Law Reform" <www.justice.govt.nz>.

128 Oranga Tamariki Act, s 5(1)(b)(iv), introduced by Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017, s 11.

Care and protection law therefore now incorporates tikanga concepts into existing law and uses guiding principles which reflect these.¹²⁹

In relation to surrogacy law reform, the Law Commission has recommended that, as part of its kāwanatanga responsibilities, the Government should commission Māori-led research to enable a better understanding of surrogacy and tikanga Māori and of Māori perspectives on surrogacy practice.¹³⁰ The Law Commission report suggests guiding principles for reform, focusing on the Crown's obligations under te Tiriti o Waitangi to facilitate the exercise of tino rangatiratanga by Māori in the context of surrogacy.¹³¹

Discussions about reforms that might deliver bicultural family law processes and principles have – with the exception of adoption and whāngai – been premised on the possibility of one law, incorporating principles important to both Treaty partners. Drawing on these discussions and some key family law legislative changes made, it might appear a relatively easy "fix" to amend COCA principles. Incremental reforms could introduce principles reflecting the messages in the long-standing Māori perspectives and critiques reviewed in Part III above.

The law could require that, in considering what is in the welfare and best interests of a particular child, courts must take into account the following principles:

- decisions must respect and uphold te Tiriti o Waitangi/the Treaty of Waitangi;
- mana tamaiti (tamariki) and the child's well-being must be protected by recognising their whakapapa and the whanaungatanga responsibilities of their family, whānau, hapū, iwi and family group;
- the primary responsibility for caring for and nurturing the well-being and development of the child lies with their family, whānau, hapū, iwi and family group;
- a child must be given reasonable opportunities to participate in any decision affecting them; and
- a child must be protected from all forms of family violence.

Let us assume for a moment that a broad consensus were possible, that private family law principles should refer to te Tiriti o Waitangi, to tikanga Māori and to the concept of mana tamaiti (tamariki). What about the current privilege accorded to parents? The roles, duties, powers, rights and

129 Despite these provisions, there are convincing critiques that the law continues to damage Māori: see Fleur Te Aho "Violent 'Care' and the Law: The Overrepresentation and Harm of Tamariki Māori in State Care in Aotearoa" (2022) 2 *Legalities* 32; and Luke Fitzmaurice-Brown "Te Rito o Te Harakeke: Decolonising Child Protection Law in Aotearoa" (2022) 53 *VUWLR* 507.

130 Law Commission, above n 120.

131 At [3.78].

responsibilities "that other family members may have"¹³² are all secondary to – and defined in relation to – the primary position of parents. The addition of the above suggested principles might be accepted, but it seems unlikely that policymakers and politicians would accept the removal of the existing principle that "a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians".¹³³

As noted above, it is this principle which represents a structural legislative barrier to giving primacy to whānau, hapū and iwi in decisions about tamariki Māori. For an amended COCA to be truly bicultural, to reflect the values of both Treaty partners, would the statutory principles require to reflect the primacy of whānau, hapū and iwi for Māori children and the primacy of parents for non-Māori children?

The discussion arrives logically at consideration of whether the best interests of a Māori child should be ascertained by applying different principles from those applicable to a non-Māori child. Or – if that were thought to be inappropriate for a bicultural law – whether the purposes of the legislation should be amended to refer to obligations under te Tiriti o Waitangi, in particular tino rangatiratanga over kāinga, and to the recognition of tikanga Māori principles in decisions about tamariki. Having stated some overarching principles in the purposes section of the amended legislation, the amended operating principles might then reflect the values of each Treaty partner, by referring both to responsibilities of whānau, hapū and iwi, and of parents/day-to-day caregivers.

The foregoing demonstrates that there can be no "easy fix" of COCA. Bicultural reform of existing COCA principles – unless it were purely tokenistic – could not be incremental. The concepts, values and principles involved are too fundamental. What is required is transformational reform.

B Need for Transformational Reform

... family justice services are still monocultural and alienating for many Māori. This must change. It is essential that the Care of Children Act 2004 recognise Te Tiriti o Waitangi and the entire family justice service commit to meaningful change.¹³⁴

In May 2019, an expert panel report for the Ministry of Justice found that Family Court processes remained monocultural and that many family justice services did not align with tikanga Māori or Māori views of whānau.¹³⁵

132 Care of Children Act, s 3(2)(b).

133 Section 5(b).

134 *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019) at 39.

135 At 37.

Even if bicultural family law principles were possible and accepted by a parliamentary majority – and it is suggested here that this would not happen unless the changes were purely tokenistic – such reform would not address the matter of the monocultural nature of COCA decision-making processes themselves. COCA currently requires that any person, other than a parent and their intimate partner, "who is a member of the child's family, whānau, or other culturally recognised family group" must apply for leave to be heard in court.¹³⁶ It is notable that the matters on which they are heard, if leave is granted, are "parenting orders". To respect tikanga Māori, whānau, hapū and iwi must be recognised as "eligible persons" in relation to all decisions about tamariki Māori.

More than that, private family law would need to recognise these groups as holders of the bundle of duties, powers, responsibilities and rights currently given to guardians under COCA. In other words, reform discussions would logically return to the colonising concept of guardianship – which is still central to private family law. Reforms seeking to add principles referring to te Tiriti o Waitangi, to whakapapa and whanaungatanga, and to tikanga Māori would require at some point in that reform process to consider: should guardianship and parental responsibility be the central concept at the heart of the law? Such a discussion would also need to consider: should "parenting orders" be the key order that can be made by the court?

Discussing public family law, Fitzmaurice-Brown has warned against the false dichotomy of incremental change or radical transformation, urging that both are important and necessary.¹³⁷ It is true that Parliament should remove – at the very least – egregious breaches of te Tiriti o Waitangi, such as the requirement to apply for leave to be heard. However, to make such a change, without addressing the foundational concepts and principles on which that requirement was based, would be tokenistic and dishonest. In the case of COCA, such incremental changes would avoid the fundamental questions that should be asked of the existing private family law.

One of those fundamental questions is: does the concept of "private" family law resonate with tikanga Māori or with te Tiriti o Waitangi? Under te Tiriti o Waitangi/the Treaty of Waitangi, the Crown promised to respect tino rangatiratanga over kāinga. When Māori exercise chiefly authority over kāinga, the relevant groups are whānau, hapū and iwi, in whichever legal sphere they find themselves. Māori critiques have long urged law reformers to focus on guarantees owed to the Māori collective under te Tiriti o Waitangi, rather than on rights or interests of individuals. It could be argued that legislation dealing only with "private" family law arrangements cannot respect tino rangatiratanga or recognise fundamental tikanga concepts of whakapapa and whanaungatanga. It is for Māori to advise whether such a law would be useful or necessary for Māori in the future.

Acknowledgment of the monocultural nature of existing guardianship laws and of the Government's obligations under te Tiriti o Waitangi suggests that the Government – or perhaps more

¹³⁶ Care of Children Act, s 47(1)(d).

¹³⁷ Fitzmaurice-Brown, above n 129, at 509.

appropriately the Law Commission – should establish a Māori-led report into, or review of, private family law provisions in Aotearoa.¹³⁸ It is to be hoped that the resulting reports, reviews and proposals for reform would be given more respect and consideration than the Māori critiques which have been produced in the past – and which are still speaking now, if policymakers and legislators cared to listen.

V CONCLUSION

... a person's cultural esteem is unavoidably affected by the wider social perceptions of that culture's worth. Entrenched ideas of cultural superiority may deliberately or unwittingly demean another culture and hence a person's perception of his worth and the worth of his heritage.¹³⁹

COCA is a Pākehā law with deep roots in colonising concepts. Its token references to whānau, hapū and iwi and to identity, language and culture do not change its fundamental nature as a monocultural, culturally assimilating law. Attempts to interpret s 5 principles to give determinative weight to whanaungatanga, identity, language and culture have been found to be errors of law, thus confirming the continuation of cultural assimilation through COCA.

The statutory esteem given to the nuclear family and the demeaning of Māori language, culture and tikanga in COCA could arguably be removed by incremental reform giving whānau, hapū and iwi automatic rights to be heard in parenting order proceedings and by reform of the existing s 5 principles. That would, however, leave guardianship – the colonising concept at the heart of COCA – intact. It would also leave any new bicultural principles subject to the overarching authority of the best interests of the child.

Aotearoa's private family law provisions require transformational reform. COCA does not respect and engage with the different family structures which exist in Aotearoa. It is therefore not fit for a bicultural Aotearoa. The Government or the Law Commission should initiate a Māori-led review of private law provisions. That Māori-led review should be guided by tikanga Māori and te Tiriti o Waitangi/the Treaty of Waitangi. Only through such reform processes could transformational, bicultural family law principles and processes be developed for Aotearoa.

138 Under the Law Commission Act 1985, s 5(1)(b), one of the Law Commission's principal functions is "to make recommendations for the reform and development of the law of New Zealand".

139 Moana Jackson *The Maori and the Criminal Justice System: A New Perspective – He Whaipanga Hou* (Department of Justice, 1987) at 40.

