


# Adoption in Aotearoa New Zealand

Discussion document



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**ISBN** 978-0-478-32494-5

Published by the Ministry of Justice

June 2021 © Crown Copyright

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## We want to hear from you

We want to hear your views on current adoption laws and your ideas for what adoption laws could look like in the future. Your views will be used to help us develop adoption policy and proposals for law change.

## How to have your say

This discussion document outlines current adoption law and practice. It highlights the issues with keeping the laws as they are, and suggests some options for how the law could be changed. Questions are listed throughout the document to help you provide your views.



You can share your views online by completing the submission form available at <https://consultations.justice.govt.nz/policy/adoption-law-reform>



You can also write your own submission and email it to [adoptionlaw@justice.govt.nz](mailto:adoptionlaw@justice.govt.nz) or post it to:



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If you have any questions about this discussion document or the Adoption Law Reform project, please contact [adoptionlaw@justice.govt.nz](mailto:adoptionlaw@justice.govt.nz)

Translated and accessible versions of the associated summary document, including a Te Reo Māori version, are available on the Adoption Law Reform webpage: [www.justice.govt.nz/adoption-law-reform](http://www.justice.govt.nz/adoption-law-reform)

A Regulatory Impact Assessment of the options set out in this discussion document is also available on the Adoption Law Reform webpage.

## Closing date to share your views

The closing date for all submissions is **5pm Tuesday, 31 August 2021**. Submissions received after this time will be considered on a case-by-case basis.

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# Glossary

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Term used	Definition
Adoptive parents	<p>We use 'adoptive parents' to describe the people who become the legal parents of the child once an adoption order has been made.</p> <p>Adoptive applicants are the people who have applied to the Court to become adoptive parents.</p>
Birth mother, birth father or birth parents	<p>We refer to the person who was the child's legal mother at birth as the 'birth mother'. We use the term 'birth father' to refer to the person who was legally or biologically the child's father at birth, noting that sometimes a birth father will not be identified on the child's birth certificate. Collectively, we refer to these people as the 'birth parents'.</p> <p>These terms are used to help distinguish between the two sets of parents involved in adoption. Using the term 'birth mother' isn't intended to reduce the role to her biological function.</p>
Child or tamaiti (children or tamariki)	<p>We refer to a child or tamaiti as a person under the age of 20 years old (unless stated otherwise). This is because this is the definition used in the Adoption Act 1955. Children or tamariki are used to refer to the collective.</p>
Child's best interests	<p>'Best interests' is a term used by the Children's Convention. It says that in all actions concerning children, the best interests of the child shall be a primary consideration. What is in a child's best interests will depend on the individual child's circumstances and means making a decision that is best for that particular child.</p>
Child born by surrogacy	<p>A child who has been born as a result of a surrogacy arrangement is referred to as a child born by surrogacy.</p>
The Children's Convention	<p>The Children's Convention is formally known as United Nations Convention on the Rights of the Child. It is an international treaty that sets out the rights of children. Aotearoa ratified the Children's Convention in 1993.</p>

	<p>The Children’s Convention says that the best interests of the child is to be the primary consideration in all actions concerning children. This means that what is best for a child should be the first and most important thing to think about when making a decision about a child.</p>
Domestic adoptions	<p>Domestic adoptions are where both the child and the adoptive applicants live in Aotearoa. These adoptions may be arranged via Oranga Tamariki or in private. You can read more on domestic adoptions at page 39.</p>
Family and whānau	<p>We define family and whānau as the broad family group, which isn’t limited to the immediate or nuclear family.</p>
The Hague Convention	<p>The Hague Convention is formally known as The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. It is an international Convention dealing with intercountry adoption and child trafficking. Aotearoa ratified the Hague Convention in 1998.</p>
Intending parent(s)	<p>We refer to the person or people who have entered a surrogacy arrangement with a woman to become pregnant, carry and deliver a child on their behalf and who will become the child’s parent(s) after birth as the ‘intending parent(s)’.</p> <p>In some cases, the intending parent(s) may have a genetic link to the child.</p>
Intercountry adoption	<p>Intercountry adoptions are where the child and the adoptive applicants live in two different countries. These adoptions may follow the law in the Adoption Act 1955, the Adoption (Intercountry) Act 1997, or the law in another country. You can read more on intercountry adoptions at page 32.</p>
Original birth certificate	<p>The original birth certificate provides information, including the names of birth parents, from a person’s original birth record which was closed when the adoption was made.</p>
Overseas adoption	<p>An overseas adoption is where both the adoptive applicants and the child live overseas. The adoption order is made overseas and is valid according to the law in the overseas country. The law recognises some overseas</p>



	<p>adoptions, so long as they meet certain criteria. You can read more on overseas adoptions at page 32.</p>
Surrogacy	<p>Surrogacy is an arrangement where one person agrees to become pregnant and carries and delivers a child for the purpose of giving parental responsibility of the resulting child to another person(s) after birth.</p>
Surrogate	<p>We define a surrogate as the woman who agrees to become pregnant, and carries and delivers a child on behalf of the intending parent(s). A surrogate may or may not have a genetic link to the child.</p>
The United Nations Declaration on the Rights of Indigenous People (UNDRIP)	<p>UNDRIP establishes a universal framework of minimum standards for the survival, dignity and well-being of the indigenous people. Aotearoa endorsed UNDRIP in 2010, but has not ratified it.</p>
Whakapapa	<p>We refer to whakapapa as the multi-generational kinship relationships that help to describe who the person is in terms of their mātua (parents), and tūpuna (ancestors), from whom they descend. This is the same as the definition in the Oranga Tamariki Act 1989.</p>
Whāngai or atawhai	<p>Tamaiti whāngai or tamaiti atawhai is a Māori customary practice where tamariki are placed in the care of others (generally whānau members), instead of the birth parents.</p>

# Introduction

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Adoption is where a child is raised by and, becomes the legal child of, a person or people other than their birth parents. Adoptions reached their highest number in Aotearoa New Zealand in the 1970s, with nearly 4,000 children adopted each year. The number of adoptions in Aotearoa has reduced over time, with only 125 adoptions granted by the New Zealand Family Court in 2020.

Aotearoa New Zealand's key piece of adoption law, the Adoption Act 1955, is now over 65 years old. An underlying principle of the law is the idea of a 'clean break' between the child and their birth parents. This meant that adoptions were generally 'closed', with the child having no information about their birth family and whānau. Changes to our understanding of best practice, and the impacts of adoption, have influenced how we now approach adoption. Most adoptions in Aotearoa these days are 'open', meaning that the child generally knows they are adopted and may have a relationship with their birth family and whānau.

While practice has changed over time, the law is largely the same now as it was when it came into force, reflecting the values and attitudes of the 1950s. It doesn't reflect modern adoption practices or fully align with the direction of domestic and international human rights obligations. It also fails to promote children's rights in the adoption process, which can place their wellbeing at risk. There is no acknowledgement of a child's culture, and the cultural needs and practices of those involved in the adoption process.

Adoption laws are now used for reasons that weren't considered at the time they came into force. For example, adoption is now used to create a full legal relationship between intending parents and children born by surrogacy. These days, intercountry adoptions, including those made overseas, make up the majority of adoptions made and recognised under our law (in addition to the 125 adoptions made by the New Zealand Family Court last year). This includes adoptions made by countries who are Hague Convention Contracting States and those that are not. Overseas adoptions made in Pacific Island countries are most commonly recognised in Aotearoa. In some cases, recognising overseas adoptions have raised serious child protection risks as other countries' laws don't match Aotearoa New Zealand's approach to child safety and welfare.

Current laws may be a source of harm for some people who have been adopted, birth parents, adoptive parents or otherwise have experiences with adoption. Adoption can have significant and lifelong effects on people, and some may experience feelings of loss and grief. Adoption can affect them in ways that many people see as essential to their personal identity, such as their culture and language. This may be more pronounced where a child is adopted outside of their culture. In particular, tamariki Māori adopted into non-Māori whānau can become disconnected from their culture and find it hard to connect to their whakapapa and whenua. This experience of cultural disconnection can be passed through to the next generations.

There have been calls to change Aotearoa New Zealand's adoption laws for a long time. We acknowledge the time and effort adoption reform advocates have dedicated over many years to bring about change. We also thank those who have been involved when previous

governments have considered adoption law reform. The hard work of those involved helps us to reflect on the past and guide the development of adoption law and policy today.

We're reviewing current adoption laws so we can look forward and create adoption law that is safe and supportive for everyone involved in an adoption. We propose placing children's rights at the centre of the law, given the significant impact adoption has on their life. New laws will also ensure we can better provide for people's cultural needs and reflect Aotearoa New Zealand's multicultural society. This includes ensuring the Crown meets its obligations toward Māori under te Tiriti o Waitangi - the Treaty of Waitangi. Reform also provides the opportunity to consider whether there is a need for adoption laws to legally recognise whāngai arrangements.

Adoption is currently the way that the intending parents become the legal parents of a child born by surrogacy. As part of reform, we will look at ways to improve the adoption process where a child is born by surrogacy, but we will not be looking at broader questions relating to surrogacy. In 2020, the Government asked Te Aka Matua o te Ture | Law Commission, Aotearoa New Zealand's independent law reform body, to undertake a wider review of surrogacy and related issues.

This discussion document describes the current law and some of the problems with it. It also suggests some ideas for addressing those problems and seeks your views. The ideas set out in this document are not the only ones we will consider. The Government hasn't made decisions on what a new adoption laws should look like. We want to hear your ideas. Your views will help to us to advise the Government on proposals for reform.

# Objectives of reviewing adoption law in Aotearoa

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The following objectives have been created to help to shape the development of adoption law in Aotearoa. They will be used to guide and consider suggestions for reform.

1. To modernise and consolidate Aotearoa New Zealand's adoption laws to reflect contemporary adoption processes, meet societal needs and expectations, and promote consistency with principles in child-centred legislation.
2. To ensure that children's rights are at the heart of Aotearoa New Zealand's adoption laws and practice, and that children's rights, best interests and welfare are safeguarded and promoted throughout the adoption process, including the right to identity and access to information.
3. To ensure that adoption laws and practice meet our obligations under Te Tiriti o Waitangi and reflect culturally appropriate concepts and principles, in particular, tikanga Māori, where applicable.
4. To ensure appropriate support and information is available to those who require it throughout the adoption process and following an adoption being finalised, including information about past adoptions.
5. To improve the timeliness, cost and efficiency of adoption processes where a child is born by surrogacy, whilst ensuring the rights and interests of those children are upheld.
6. To ensure Aotearoa meets all of its relevant international obligations, particularly those in the UN Convention on the Rights of the Child and the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption.

# What is adoption?

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This section of the discussion document provides an overview of adoption and the general domestic adoption process in Aotearoa. It discusses the purposes of adoption and seeks your views on some options for change.

## Overview of current adoption laws

Aotearoa New Zealand's adoption laws are set out in three Acts. All adoptions in Aotearoa occur within this framework, but there is some flexibility in how the law is applied in practice.

<p><a href="#">Adoption Act 1955 ('the Adoption Act')</a> sets out most of Aotearoa New Zealand's law on domestic adoption, with some international elements. It says who can adopt and be adopted, when an adoption can be made, the legal effect of an adoption, and other related matters.</p>	<p><a href="#">Adult Adoption Information Act 1985</a> sets out the rules on how people who have been adopted and birth parents can access adoption information.</p>	<p><a href="#">Adoption (Intercountry) Act 1997 ('the Adoption (Intercountry) Act')</a> sets out the law on some adoptions where the child and the adoptive applicants live in two different countries. It gives effect to the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption ('the Hague Convention').</p>
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The majority of adoptions in Aotearoa take place under the Adoption Act. An adoption order made under that Act transfers the legal rights and responsibilities toward children from birth parents to adoptive parents. Adoption orders are made by the New Zealand Family Court. Once an order is made, the law treats the child as if they were born to the adoptive parents. In Aotearoa, adoption is the only way that intending parents can be recognised as the legal parents of a child born by surrogacy.

An adoption order allows the adoptive parents to make decisions for the child and provide their day-to-day care. It also creates new legal relationships between the child and adoptive family and whānau. At the same time, the adoption order removes the child's legal relationship to their birth parents and birth family, whānau, hapū and iwi. This can affect the child's connection to their whakapapa and cultural heritage.

## International law

International agreements also influence and form part of our adoption laws. There are a number of international agreements that impact our adoption laws. These include, but are not limited to, the:

- United Nations Convention on the Rights of the Child ('the Children's Convention') applies to everyone under 18 years old and sets out the wide-ranging rights children have. The three key rights areas are protection, provision and participation. Article 21 of the Children's Convention says that where adoption is allowed, the best interests of the child should be the paramount consideration.
- The Hague Convention sets out internationally agreed rules and processes for intercountry adoption. Countries that are signed up to the Hague Convention must follow its rules when arranging and finalising certain intercountry adoptions.
- United Nations Declaration on the Rights of Indigenous Peoples recognises the right of indigenous families and communities to keep shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child.
- United Nations Convention on the Rights of Persons with Disabilities protects the rights and dignity of persons with disabilities.

## The wider system

Adoption is one type of legal arrangement by which children can be looked after in Aotearoa. It is at one end of a range of options for alternative ways a child could be cared for, as it has wide-reaching legal implications. Adoption orders create a new legal identity for a child and have an effect on future generations.

There are other options available to provide care for children. The Care of Children Act 2004 and the Oranga Tamariki Act 1989 set out some of the other care options available, including different types of guardianship and parenting orders. Information on different care arrangements can be found on the below webpages:

- Parenting and guardianship on Te Tāhū o te Ture - Ministry of Justice website: [www.justice.govt.nz/family/care-of-children/parenting-and-guardianship/](http://www.justice.govt.nz/family/care-of-children/parenting-and-guardianship/)
- Types of caregiving on the Oranga Tamariki – Ministry for Children website: [www.orangatamariki.govt.nz/caregiving/types-of-caregiving/](http://www.orangatamariki.govt.nz/caregiving/types-of-caregiving/)

Guardians generally have legal duties, rights and responsibilities toward the child. Guardians might also have day-to-day care of the child, but the child's legal parents usually stay the same.

The majority of children who enter Aotearoa New Zealand's care and protection system have legal guardians appointed for them. They aren't usually adopted. An underlying principle of the care and protection system is that the main responsibility for caring for and nurturing the wellbeing and development of a child or young person belongs to their family, whānau, hapū, iwi and family group. Having regard to mana tamaiti, whakapapa and whanaungatanga is a part of considering what is in the best interests of the child. In the care and protection system, it is preferred if the child stays with the family, whānau, hapū, iwi or family group if they are able to meet their needs.

Some other arrangements aren't set out in the law but are used in Aotearoa. For example, tamaiti whāngai or tamaiti atawhai is a Māori customary practice where tamariki are cared for by others, usually within the wider whānau or hapū. Customary practices similar to adoption are also practiced by other cultures, including Pacific cultures. Customary practices can take place outside of the legal process for adoption. People may also enter other informal care arrangements that are not covered by existing laws.

## **Te Tiriti o Waitangi - the Treaty of Waitangi**

Te Tiriti o Waitangi - the Treaty of Waitangi is a founding constitutional document in Aotearoa. Te Tiriti sets out and guides the relationship between the Crown and Māori. Te Tiriti provides further context for considering the suitability of Aotearoa New Zealand's current adoption laws.

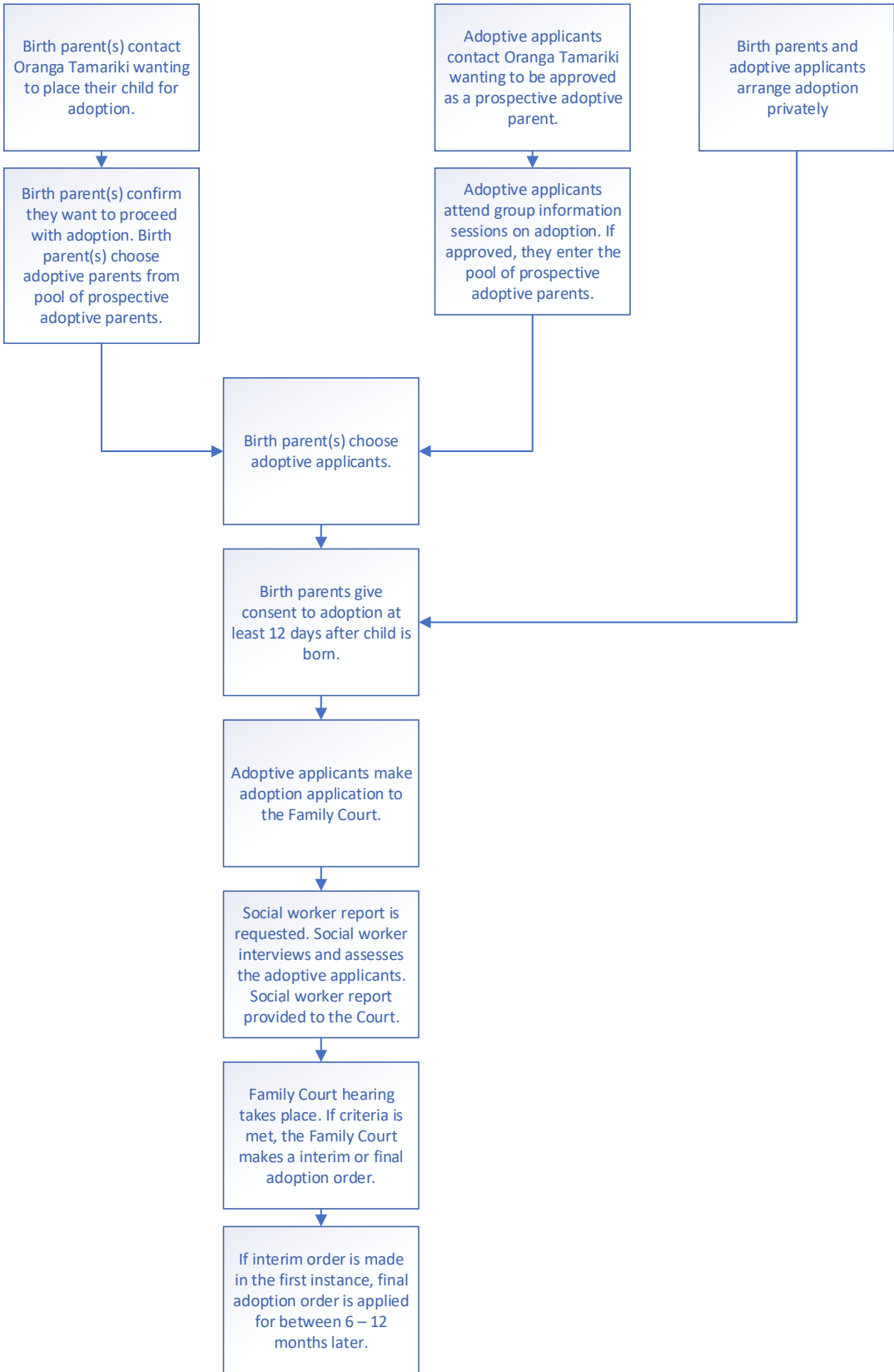
For example, Article Two of te Tiriti provides Māori the right to make decisions over resources and taonga. In te ao Māori, tamariki are viewed as a taonga who belong to the wider whānau, hapū and iwi. As taonga, tamariki should be nurtured and treasured. This means taking account of the physical and mental wellbeing of tamariki, as well as considering their wellbeing holistically. This includes their taha whānau (social wellbeing) and taha wairua (spiritual wellbeing). Current adoption laws don't recognise the impacts of adoption on tamariki, including the impacts it can have on future generations. The laws also don't recognise the importance of whakapapa ties and the need to protect cultural heritage and identity, which are also considered taonga.

It is important that any changes to adoption laws take account of te Tiriti and that thought is given to how those changes may impact Māori.

**How do you think the Crown could meet its obligations toward Māori under te Tiriti o Waitangi - the Treaty of Waitangi in regard to adoption?**

# Overview of the adoption process

The diagram below provides a simplified example of the domestic adoption process in Aotearoa:





# Purpose of adoption

The Adoption Act doesn't define what adoption is or when it should be used. This means that adoptions have been made for different reasons depending on the context, societal norms and era.

Some examples of why adoptions have been made in Aotearoa in the past are to:

- give a child a permanent family and whānau
- ensure a child who, for whatever reason, can't be cared for by their parents can be raised in a stable and secure family and whānau environment
- ensure a child can inherit property belonging to the adoptive family and whānau
- provide a child for a couple who, for whatever reason, can't give birth to their own child
- legally recognise a child's connection to a step-parent or foster parent
- transfer legal parent rights from surrogate parents to the intending parents under a surrogacy arrangement
- give immigration benefits to a child
- bring a child out of poverty in the developing world into the opportunities and advantages of life in Aotearoa
- allow for families and whānau or relatives to be reunited with each other.

## ***Issues with the current approach***

As the law doesn't set out the purpose of adoption, it can be unclear when an adoption should happen. In some cases, it could mean that adoptions are made for reasons that Aotearoa New Zealanders don't generally agree with. It could also mean that adoptions are made in situations that might not be in the child's best interests.

The Children's Convention and the Hague Convention say that the child's best interests should be the paramount consideration in adoption cases. This isn't reflected in the law. The Hague Convention also says that children should grow up in a family environment and that permanent arrangements for the child should be preferred over temporary ones.

Other countries describe the purpose of adoption in their law. For example, the law in the Australian state of Queensland says that the purpose of adoption is to provide for a child's long-term care, wellbeing and development by creating a permanent parent-child relationship between the child and the adoptive parents.

## ***Options for change***

It may be helpful for adoption laws to set out what the purpose of adoption is in Aotearoa. Providing a purpose would make it clear when and why adoption should be used. Other changes to the law and practice would also be needed to ensure the purpose is met.

There are different ways the law could define the purpose of adoption. It could say adoption is for one specific purpose, or it might be a mix of purposes.

Some examples of how the law could define the purpose of adoption, in a more child-centred way, include:

- to provide stability or security for a child
- to provide a new permanent family for a child
- to provide continuity of care for a child
- to provide long-term care and a family and whānau home environment for a child
- to promote a child's wellbeing and development, or to promote the child's best interests
- that adoption should be a service for a child (and therefore not a service for the adults involved)
- to deepen a child's connections with family, whānau, hapū and iwi by living with other relatives
- to provide care for a child who cannot be raised by their birth family and whānau, or where they are in need of a new family and whānau
- in the case of intercountry adoption, to provide care for a child where they cannot be cared for in their home country
- to provide legal recognition of social connections and/or close relationships.

**Do you think that the law should say what the purpose(s) of adoption are?**

**What do you think about the options we've listed?**

**Are there any other options you think we should consider?**

**Are there any purposes that you don't think adoption should be used for?**

# Who is involved in adoption?

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This section of the discussion document outlines who is involved in the adoption process and what their role is. This includes the child being adopted, the birth parents, the adoptive parents, the birth family and whānau of the child, the government, the Court and accredited bodies.

## Overview

Adoption is often described as a ‘triangle’ of relationships between the child who is adopted, birth parents and adoptive parents. This reflects how the law currently views who is involved in the adoption process. All three relationships are connected with one another.

- **The child** who is placed for adoption.
- **The birth parents** who the child is born to and who have the legal rights and responsibilities toward the child at birth.
- **The adoptive parents** who get the legal rights and responsibilities toward the child once the adoption is made.

While not in the adoption triangle, a child’s wider birth family and whānau also often play an important role in their life, particularly for Māori and Pacific peoples. In some cases, wider birth family and whānau are involved in the adoption process. However, there is no legal requirement for them to be involved.

The government plays a number of roles in the adoption process. Government departments, including Oranga Tamariki – the Ministry for Children, Department of Internal Affairs and Immigration New Zealand, may be involved. The New Zealand Family Court makes orders for most adoptions in Aotearoa. Accredited bodies (organisations approved to provide some intercountry adoption services) are able to perform assessment or placement functions for intercountry adoptions under the Hague Convention.

# Child's rights in the adoption process

Adoption is a process that focuses on the care, responsibilities and rights relating to a child. Despite this, current adoption laws are adult-focused and don't clearly promote children's rights.

The Adoption Act currently defines a child as a person under 20 years old. An adoption order can be made for a child until they reach that age. The Act says that before making an adoption order, the Court must be satisfied that the welfare and interests of the child will be promoted, which includes considering the child's wishes.

The Children's Convention identifies that children have 54 key rights. The main right is for a child's best interests to be a primary consideration in decisions affecting them. Any decisions about a child should focus on what is best for the child and should protect their wellbeing.

The rest of the rights in the Children's Convention can be described as provision, protection and participation rights. Provision rights relate to a child's right to be cared for and, for example, have access to medical care and education. Protection rights include ensuring a child is safe, healthy and free from discrimination. A child's right to culture and identity is also protected under the Children's Convention.

Participation rights focus on giving the child the chance to have their say, encouraging them to share their views, and taking their views into account. A child's right to participate is set out in Article 12 of the Children's Convention. Allowing children to participate can help them feel valued, respected and involved. It can also help the Court decide whether an adoption is in the child's best interests. How a child participates in their adoption case will look different depending on their age.

## ***Issues with the current approach***

The Adoption Act's definition of who is a child doesn't match other pieces of family law. The Children's Convention defines a child as someone under the age of 18 years old. Most domestic law also says that a child is a person under 18 years old and this matches with Aotearoa New Zealand's understanding of who is a child. The current law means that 18- and 19-year olds, who can usually live independently, can be adopted.

On the other hand, some people aged 20 years and over may wish to be adopted. Adoption can provide them with sense of belonging or connection with people who have cared for them or with whom they have a close relationship. In some cases, adult adoption could also provide practical support, for example, where a person needs lifelong care and support.

Aotearoa New Zealand's adoption laws don't clearly recognise children's rights as set out in the Children's Convention. For example, they don't require a child's best interests to be the paramount consideration in adoption cases. This doesn't match other pieces of family law in Aotearoa, such as the Care of Children Act and the Oranga Tamariki Act. It is also inconsistent with viewing children as taonga whose wellbeing should be nurtured.

In practice, Oranga Tamariki social workers support and maintain the child's rights and focus on their wellbeing. Social workers encourage birth parents and adoptive parents to think about what is best for the child. The New Zealand Family Court also often applies the Children's Convention and thinks about the child's best interests when making adoption

decisions. However, this practice isn't clearly set out in our laws which creates a risk that this approach will not always be taken.

The law doesn't clearly allow the child to participate in their own adoption process, meaning the way they are involved can vary from case-to-case. Some people think that that requiring the Court to consider the child's 'wishes' is narrower than requiring it to hear a child's views or to participate more broadly. Children who can't participate in their adoption decisions may find it difficult to understand what is happening to them and feel that their voice isn't valued or listened to. Helping children to participate in the adoption process can ensure that better informed decisions are made.

The law doesn't say how to get a child's wishes or how their wishes should be given to the Court. In some cases, the child's wishes will be given to a judge in a social worker report. The Court might also appoint a lawyer to assist who can share the child's wishes with the judge. The way child's wishes are shared with the Court can be inconsistent and may not be the best way to work with the child.

Children are also not required to agree to their adoption. Birth parents decide to place a child for adoption and decide who will adopt the child. This is the case even if the child is older and can understand the effect of the adoption. Children's agreement (also known as 'consent') to adoption is discussed under *Consent* at page 39.

### ***Options for change***

Changes could be made to who is able to be adopted under the law. For example:

- The definition of child could be changed to mean a person under a different age, for example under 16 or 18 years old. This would match other family law and international agreements, but would mean anyone older wouldn't be able to be adopted.
- There could be no age limit for who is able to be adopted, meaning adults could be adopted. For example, some older people might want to be adopted so that they can have their relationship with parent-like figures legally recognised. If adults were able to be adopted, this would have a significant effect on what the purpose of adoption is.

Ensuring that children's rights are at the heart of the adoption process is a key focus of adoption reform. Options that would make children's rights central to our adoption laws and allow children to participate more fully could include:

- Setting out an overriding duty in our adoption laws to ensure that the adoption and other decisions affecting the child are made in the child's best interests. This would be consistent with other child-centred law and our international obligations.
- Giving the child a right, or reasonable opportunity, to participate in their adoption process as part of overarching principles or purpose of our adoption laws. This could guide people using the law and mean that children's participation is provided for in the entire adoption process.
- Explicitly referencing the Children's Convention, including the child's right to participate.
- Requiring that the child be provided with age and understanding-appropriate information about the adoption, its impact and their rights, and time and support to decide and share their views.

- Requiring the social worker, or specific advocate, to encourage the child to participate and say how the child participated in their report to the Court.
- Setting out in law ways to encourage and help the child to participate once the adoption reaches the Court. For example, the law could require that the child's views be obtained and taken into account. Although this usually happens in practice, requiring it by law could make sure it is applied consistently.
- Giving the Court the power to appoint a lawyer or another person to act as the child's advocate. This could make sure the Court hears the child's views and evidence on whether the adoption would be in the specific child's best interests. This may be useful where the child is very young, has a disability, or has difficulties communicating.

**Who do you think should be able to be adopted?**

**How do you think children's rights, including participation rights, could be better included in the adoption process?**

**What do you think about the options we've discussed?**

**Are there any other options you think we should consider?**

## Birth parent's role in the adoption process

The law says that the person who gives birth to a child is the child's legal mother. If the mother is married between the child's conception and giving birth, their husband is presumed to be the child's father. In some cases, a father isn't listed on a birth certificate. The birth mother and birth father are the child's legal parents at birth, meaning they have legal rights and responsibilities toward the child.

Placing a child for adoption is a big decision to make. The reasons for placing a child for adoption are personal and will differ from case-to-case. Often, birth parents will reach out to Oranga Tamariki when they want to place their child for adoption. Oranga Tamariki social workers can help and support birth parents through the adoption process. This includes discussing care options, the adoption process and support available, and assisting birth parents to choose adoptive parents. Birth parents can also access some information and support after the adoption through Oranga Tamariki.

Birth parents are required to give their agreement (also known as 'consent') to an adoption. A birth mother will always need to agree to the adoption. A birth father's agreement isn't needed if he isn't recognised as one of the child's legal parents or guardians.

### ***Issues with the current approach***

Once agreement is given, the birth parents don't have a further role in the adoption process. Birth parents don't have the right to attend the adoption hearing, or to be heard by the Court. This means the Court may not hear important information relating to the application, including the reasons for placing the child for adoption. It also means the Court isn't able to hear the birth parents understanding of what contact with the child and adoptive parents will look like after the adoption.

Issues relating to access to information and support is discussed further in *Impacts of adoption* at page 53, and issues with current consent rules are discussed under *Consent* at page 39.

### ***Options for change***

The law could be changed to give birth parents the right to participate in adoption cases once they get to the Court, or to require the Court to hear from the birth parents before it makes an adoption order. This would mean the Court has all relevant information before making a decision and could help it decide whether alternative contact orders are also needed. Alternative orders are discussed further under *Alternative care arrangements and orders* at page 49.

Options for change relating access to information and support, and consent rules are discussed further in the sections mentioned above.

Do you think changes should be made to the birth parents' role in the adoption process?

What do you think about the option we've discussed?

Are there any other options you think we should consider?

## Who can adopt?

Current adoption laws set criteria for who can adopt a child under the domestic adoption process. If a person meets the criteria below (also known as 'eligibility criteria'), they then are assessed on their suitability to adopt. Suitability is discussed further under *Suitability to adopt* at page 43.

Table 1: Eligibility criteria for who can adopt a child

Criteria	Description
Marriage status	A person may apply to adopt a child on their own, or two spouses may apply to adopt together. The Court has said that 'spouse' means two people who are married or in a de facto relationship, regardless of their sexual orientation.
Age	A person wanting to adopt must be at least 25 years old, and at least 20 years older than the child being adopted.  If two spouses are adopting, at least one person must be 25 years old and the other must be at least 20 years old.
Gender	A male may not apply alone to adopt a female child, unless the male is also the child's father or there are exceptional circumstances. There are no restrictions on single females adopting a child.

### Issues with the current approach

#### Discrimination

The Human Rights Review Tribunal found that stopping certain people from being able to adopt based on their marital status, age and gender is discriminatory:<sup>1</sup>

- **Marriage status.** The Tribunal said this was discriminatory as it stopped unmarried couples from adopting. The Court has said that the meaning of spouse includes de

<sup>1</sup> *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9.



facto couples, even though the law doesn't explicitly say this. However, there is still a question as to whether a civil union couple can adopt.

- **Age.** People who don't meet the Act's age requirements must prove to the Court that there are special circumstances to adopt a child. The Tribunal said this was discriminatory as a person's age is the only reason they can't adopt a child.
- **Gender.** The Tribunal said there is gender discrimination as the rules restricting single males from adopting a child do not apply to females.

These restrictions reflect an era when society's attitudes towards family and whānau structure were different. It can mean people aren't able to adopt even if they would be suitable and the adoption would be in the child's best interests. The criteria don't reflect modern family and whānau structures. For example, they don't recognise couples in same-sex marriages and relationships, and the fact that many couples live in de facto relationships. The criteria also don't recognise concepts of gender identity and gender fluidity.

Other laws relating to the care of children don't have similar restrictions. Instead they focus on whether a person is suitable to care for the child on an individual, case-by-case basis.

#### *Adoptions by step-parents*

Step-parents sometimes apply to adopt their step-child together with one of the birth parents. In these cases, the step-parent replaces the other birth parent as the child's legal parent.

An adoption by a step-parent may be supported by the child. For example, the child may want their close relationship with their step-parent legally recognised, which can include changing their last name to match the step-parent's. This may happen when the other birth parent and their family and whānau has little involvement in the child's life. In some cases, the child may be too young to share their views on the adoption.

On the other hand, it has been argued that an adoption by a step-parent is unlikely to promote a child's welfare and interests. This is because an adoption removes the child's legal relationship with one side of their birth family and whānau, which has an effect on the child's whakapapa and identity. In addition, a step-parent is likely to continue to be in the child's life, regardless of whether the adoption takes place.

In practice, Oranga Tamariki encourages step-parents to consider other alternatives to adoption, such as guardianship orders, to legally recognise their relationship with the child. Alternative orders are discussed under *Alternative care arrangements and orders* at page 49.

#### *Adoptions by relatives*

Relative adoptions, where a child is adopted by a member of their wider family and whānau, also occur in Aotearoa. Relative adoptions may take place where the child's birth parents are alive or deceased.

In some cultures, it is common for a child to be raised by relatives other than the birth parents. These may take place as a type of customary adoption. Different forms of customary adoptions are discussed under *Customary adoptions* at page 29.

In Aotearoa, the legal effect of relative adoptions can confuse the biological relationships between the child and the relative adopting them. For example, if a grandparent adopts their grandchild, the law makes it look like the birth parent is the child's sibling. There are other orders, such as guardianship orders, which may be more appropriate in these cases.

## ***Options for change***

The law relating to the eligibility of people to adopt could be changed to:

- Remove the eligibility criteria completely, meaning that anyone would be able to apply for an adoption order. The Court could then decide whether the adoptive applicants are suitable to adopt the child on a case-by-case basis. This would be a more tailored approach and adoptive applicants would be assessed on their individual suitability.
- Keep just some of the eligibility criteria. For example, all eligibility criteria could be removed but the age criterion could be kept. Some people might think that a person should have to be a certain age before they can adopt.
- Modify the current eligibility criteria. For example, the age criterion could be changed to say a person must be 18 years old before they can apply to adopt. The meaning of 'spouse' could be changed to refer to anyone in a 'qualifying relationship', such as a marriage, civil union or de facto relationship.
- Add in new eligibility criteria. For example, a new criterion could be added saying that step-parents or relatives of a child aren't eligible to adopt the child, or may not be eligible to adopt unless there are special circumstances.

**Do you think there should be any changes to who is eligible to adopt?**

**What do you think about the options we've discussed?**

**Are there any other options you think we should consider?**

## Birth family and whānau

These days, Oranga Tamariki strongly encourages birth parents to involve their family and whānau in discussions about the care of a child before placing them for adoption (see table below). However, our laws don't require this to happen.

Family members, whānau, hapū and iwi play an important role in the life of their grandchild, sibling, niece or nephew. Māori and Pacific peoples place particular importance on wider family and whānau involvement in the life of children. Decisions made collectively that involve family and whānau can ensure a range of viewpoints are considered when deciding what type of care arrangement might be in a child's best interests.

*Table 2: Adoption process and the role of family and whānau*

Adoption stage	Practice
Pre-adoption	Oranga Tamariki encourages the birth parents to consider placing the child in the care of family and whānau members before looking to place the child outside of the family and whānau. The birth parents are also encouraged to discuss their situation with their families and whānau and involve them in the decision-making process.
During the adoption process	<p>In its report to the Court, a social worker may recommend the child be placed in the care of family and whānau members (such as grandparents) instead of an adoption, where this option is available.</p> <p>Social workers are not required to speak with the family and whānau when writing their report. They are also not required to recommend a child be placed with family and whānau if this is an appropriate option.</p>
After an adoption is granted	<p>Ongoing contact between the child and birth family and whānau is encouraged.</p> <p>Sometimes a contact agreement may provide for the child to have regular contact with the birth family and whānau. Contact agreements are usually between the birth parents and adoptive parents and are not legally enforceable. Family and whānau may not have an opportunity to help develop of a contact agreement.</p>

### ***Issues with the current approach***

Our current laws don't recognise the role of a child's family and whānau in their upbringing, or how important a child's links to their whakapapa are. Adoption laws focus on the individuals involved in the adoption, rather than taking a collective approach. As family and whānau have no right to participate in adoption decisions, there are not many opportunities for them to be involved during the adoption process. The legal links to birth family and whānau can be removed without involving them in the decision.

Birth parents may decide to place their child for adoption without involving their family and whānau. This can create a tension in cases where, for example, grandparents want to raise the child, but the birth parents don't want family and whānau to be involved for personal reasons. Sharing information about a potential adoption with birth family and whānau without the birth parents' consent would raise privacy issues.

In some cases, family and whānau involvement during the adoption process may provide benefits through support to the birth parents. It may also help find alternative care arrangements for the child, which could help them keep their links to their whakapapa. Alternative orders, including other care arrangements, are discussed further under *Alternative care arrangements and orders* at page 49. Family and whānau involvement may also confirm that the adoption is in the child's best interests.

Involving the birth family and whānau in other cases may be inappropriate, depending on the family and whānau dynamics. For example, in some cases it could create safety risks for the birth parents or child, or not be useful where there has been a significant breakdown in relationships.

Once a case gets to the Court, only the applicants, as parties to the adoption case, are able to attend and speak to the Court. While a judge can allow the birth parents, and family and whānau members to attend, they have no right to speak to the Court.

### ***Options for change***

The law could be changed to allow family and whānau interests to be considered at different stages of the adoption process. In considering changes to the law, care needs to be taken to ensure that family and whānau dynamics are considered, including any safety needs of the birth parents or child. Thought may also be needed on whether exceptions are needed, for example where there has been significant family or whānau breakdown.

Options for enhancing the role of family and whānau in the adoption process could include:

- Allowing family and whānau involvement in the adoption, for example by:
  - Requiring the social worker to interview the family and whānau and include their views on the adoption in their report to the Court.
  - Making it compulsory for Oranga Tamariki to organise a family meeting or whānau hui before the adoption. This could provide an opportunity for family and whānau involvement, with a focus on what is in the child's best interests. Oranga Tamariki or another organisation could provide mediation if needed.
- Requiring the Court to consider the child's relationship with their birth family and whānau. This could help to inform whether an adoption is in a child's best interests.

- Giving family and whānau the right to attend and speak in the Court during the adoption hearing. This would allow the Court to hear directly from family and whānau about what they believe would be in the child's best interests. This could also extend to the child's hapū and iwi.
- Allowing the child's family and whānau to be added to the adoption hearing. This would give family and whānau the right to support or oppose the adoption. They could also offer alternative care arrangements to the Court. This right would have to be balanced with the birth parents' right to make decisions about their child. It could result in some tension between the birth parents and the family and whānau, particularly if there is family breakdown.
- Providing ways for family and whānau to maintain a connection with the child following the adoption. Options for maintaining a relationship with birth parents and the wider family and whānau are discussed under *Alternative care arrangements and orders* at page 49.

**Do you think wider family and whānau should be able to participate in adoption proceedings?**

**What do you think about the options we've discussed?**

**Are there any other options you think we should consider?**

# Government, the Court and accredited bodies

The government, the Court, and accredited bodies are involved in the adoption process. Their roles are discussed below.

## ***Oranga Tamariki – Ministry for Children***

Oranga Tamariki provides a service for birth parents wanting to place their child for adoption. Birth parents don't have to use Oranga Tamariki services. Oranga Tamariki works with the birth parents and gives them information and support to help them make informed decisions about their child's care.

Oranga Tamariki also provides services for potential adoptive parents. It provides education and training for people considering adoption, including an overview of the process and other ways of caring for children. Oranga Tamariki also pre-approves and maintains a pool of potential adoptive parents who are shown to birth parents considering adoption. When requested by the Court, Oranga Tamariki will assess adoptive applicants and provide a social worker's report.

Oranga Tamariki's involvement varies between cases, depending on the way an adoption application is made. If the birth parents contact Oranga Tamariki, it will usually be involved throughout the whole process until a final adoption order is made. If an adoption is arranged privately and an application is made directly to the Court, Oranga Tamariki may only be involved when preparing a social worker report for the Court.

Oranga Tamariki is also the 'Central Authority' for intercountry adoptions under the Hague Convention. This means it undertakes assessments, arranges and finalises adoptions where a child is to be adopted from another Hague Convention country. The Hague Convention adoption process is discussed under *Hague Convention intercountry adoptions* at page 35.

## ***The Court***

The Family Court is responsible for considering adoption applications and granting interim and final orders. When making decisions, the Court may look at other laws and international agreements.

The Family Court will consider information in the adoption application and will usually consider additional evidence supporting the application. This can include evidence about the identity of the adoptive applicants and the child to be adopted, and the birth parents' agreement to the adoption.

The Family Court also receives a social worker report to help it decide whether the applicants are fit and proper, and if the adoption is in the child's interests. The Family Court may also receive other evidence through a lawyer to assist the Court or by the judge speaking directly to the child or adoptive parents.

## ***Department of Internal Affairs***

The Department of Internal Affairs is responsible for recording, holding, and releasing information about birth records, including adoption information.

When an adoption order is made, the Department of Internal Affairs issues a new birth certificate for the child. A person who has been adopted can apply to receive a birth certificate which shows information from their original birth records (what is described as their 'original birth certificate') from the Department of Internal Affairs. Birth certificates and access to adoption information are discussed under *Impacts of adoption* at page 53.

The Department of Internal Affairs is also responsible for granting people citizenship. Children adopted by an Aotearoa New Zealand citizen, will often be entitled to Aotearoa New Zealand citizenship. Once an adoption is finalised, the child (or their adoptive parents) can apply for their citizenship to be recognised through the Department of Internal Affairs.

## ***Immigration New Zealand***

Immigration New Zealand sometimes also plays a role in intercountry adoptions. Children being adopted via intercountry adoption, or who have been adopted overseas by an Aotearoa New Zealand citizen or resident, may need a visa to enter Aotearoa.

Where a child is born by surrogacy overseas, the child will usually come to Aotearoa with the intending parents on a temporary visa granted by the Minister of Immigration. The child stays on this temporary visa until a final adoption order is granted. International surrogacy is discussed more under *International surrogacy arrangements* at page 64.

## ***Ministry of Justice***

Te Tāhū o te Ture - Ministry of Justice is responsible for looking after the three pieces of adoption law. This means that, if the government want to change the laws, the Ministry of Justice is primarily responsible for giving the government advice.

## ***Accredited bodies***

For Hague Convention intercountry adoptions, accredited bodies can play a role in facilitating adoptions. Accredited bodies are non-government organisations who have been given power by the government to carry out education and assessment functions, or functions associated with facilitating and finalising adoptions. An accredited body may not perform both functions.

Currently, there are three accredited bodies; Intercountry Adoption New Zealand (ICANZ), Compassion for Orphans and Adoption First Steps.

Accredited bodies are not involved in domestic adoption.

**Do you have any views on the government and the Court's roles in the adoption process?**

**Do you have any views on the role of accredited bodies?**

# Culture and adoption

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This section of the discussion document outlines how culture is considered in the adoption process. It discusses tamaiti whāngai or tamaiti atawhai, as well as types of customary adoptions practised by other cultures.

## Culture and adoption

Aotearoa is culturally and ethnically diverse. Identifying with a particular culture gives people feelings of belonging and security. Culture can be a defining feature of a person's identity, affecting how they see themselves and the groups they identify with. For Māori, whanaungatanga and the knowledge of whakapapa are particularly important to identity and create a sense of belonging.

Our current adoption laws reflect Western understandings of adoption and family, and don't reflect other cultural values or concepts. The only references to culture or ethnicity in our current adoption laws say:

- An adoption order may be made in respect of any person, whether Māori or not, in respect of any child, whether Māori or not. This makes it clear that tamariki Māori can be adopted by non-Māori adoptive parents without restriction.
- Where both the child and adoptive applicants are Māori, a Māori person must prepare the social worker report.

In practice, adoptive parents are encouraged to have some type of connection to the child's cultural heritage and language and be able to nurture a child's cultural identity. Oranga Tamariki can provide some information on a child's cultural and language needs, and link adoptive parents to support groups. Where an adoption is 'open', the birth parents may help the child have ongoing access to their cultural heritage, language and identity.

The Court often takes the child's cultural and language needs into account when deciding whether to make an adoption and may consider how the adoptive applicants will support the child's cultural and language needs. However, this isn't a legal requirement.

### ***Issues with the current approach***

Current adoption laws are monocultural and don't recognise people's cultural needs in the adoption process. The law doesn't recognise that the child has a right to culture or require that the child's culture be thought about in making the adoption decision. For example, the birth parents aren't required to provide information about cultural heritage when they place their child for adoption.

Because adoption removes a child's legal ties to their birth family and whānau, their legal connections to their culture, heritage and language may also be lost. For tamariki Māori, this can also impact on their whakapapa and whanaungatanga connections. The law provides that a child's name can legally be changed once an adoption order is made, which may be their last link to their birth culture and heritage.



Adoptive parents are responsible for supporting a child to maintain, understand, and foster their cultural heritage, language and identity. However, they may not know how to meet the child's needs or lack access to support and resources to help. In other cases, adoptive parents may overlook, or not fully understand, the importance of a child's cultural heritage and identity.

Where the adoptive parents can't meet a child's cultural or language needs, the child may feel displaced or disconnected from their birth family and whānau and cultural community. This can make it harder for the child to create a sense of identity and belonging. Those impacts can affect future generations, with the future children of the person who has been adopted also feeling a loss of identity and connection to their whakapapa.

### **Options for change**

The law could be changed to better include children's cultural and language needs in the adoption process. For example, the law could:

- Require birth parents to provide information about their culture and heritage when they place their child for adoption.
- Include objectives or principles relating to culture. It could do this by saying that a child's culture and language is a key consideration in adoption cases.
- Say that the Court must take a child's cultural and language needs into account when deciding if an adoption is in a child's best interests. This could mean that adoptive applicants need to provide evidence on how they will meet a child's cultural and language needs.
- Allow the Court to order a cultural report about the child's cultural and language needs. Cultural reports identify any cultural differences between the child and the adoptive parents, the child's cultural needs, and explain how the adoptive applicants say they will foster the child's culture.
- Better provide for family and whānau involvement in the adoption process, particularly after the adoption, to make sure a child is able to maintain cultural and whakapapa ties. Family and whānau involvement in the adoption process is discussed under *Birth family and whānau* at page 21, and under *Alternative care arrangements and orders* at page 49.

Another option could be to provide educational resources and support services to the child or adoptive parents. This could be in addition to, or instead of, possible law changes.

**Do you think there should be changes to how a child's culture is considered in the adoption process?**

**What do you think about the options we've discussed?**

**Are there any other options you think we should consider?**

**How can Aotearoa New Zealand's adoption laws be made more culturally inclusive?**

# Whāngai

Tamaiti whāngai or tamaiti atawhai is a Māori customary practice where tamariki are cared for by others (generally whānau members), instead of the birth parents. Whāngai arrangements may occur for different reasons. For example, whāngai may be used where the birth parents of tamariki cannot care for them, to enhance kinship ties, to ensure survival of whakapapa lines, or to assist childless couples within the whānau.

The terms whāngai or atawhai can have different meanings and the effect of a whāngai arrangement may differ between hapū and iwi. The differences in whāngai practice are acknowledged in Te Ture Whenua Māori Act 1993. That law provides that the tikanga of the hapū or iwi related to the land claim is to be followed when deciding if tamaiti whāngai can inherit a land interest.

Whāngai is often referred to as ‘Māori customary adoption’, though there are many differences between whāngai and adoption as set out in the Adoption Act. The principle of kinship ties or whanaungatanga is central to the practice of whāngai. Unlike closed adoption practice, tamariki are usually aware of their whāngai status and will often keep a relationship with their birth parents and whānau. This helps promote the interests of the child, as they understand where they came from. This can lessen feelings of displacement or a lack of belonging.

Aotearoa New Zealand’s adoption laws don’t legally recognise whāngai arrangements, and other parts of the law only recognise whāngai in limited circumstances. For example, whāngai arrangements may be recognised for the purposes of Māori land succession in accordance with Te Ture Whenua Māori Act 1993 or for the purposes of paid parental leave.

## ***Issues with the current approach***

Whāngai parents do not have legally recognised parental rights and responsibilities toward whāngai tamariki. The Adoption Act explicitly says that adoptions according to Māori custom don’t have a legal effect. As a result, whāngai parents may have trouble accessing government, educational or medical assistance for whāngai tamariki. Whāngai tamariki may also experience difficulties, for example, as they have no legal relationship with their whāngai parents, they may not be able to participate in te Tiriti o Waitangi claims or be able to inherit Māori land.

In some cases, whānau may choose to formalise a whāngai arrangement through a court order to establish their legal relationship with whāngai tamariki. For example, an adoption order or a parenting or guardianship order under the Care of Children Act could be used. These orders can allow whāngai parents to exercise the usual parental rights and responsibilities toward te tamaiti.

A court order may provide legal security or certainty for the child and whānau. However, court orders can affect whānau, hapū and iwi rangatiratanga, as it transfers decision-making power from the collective to an individual. Collective decisions may be made at the whānau, hapū or iwi level and can ensure a diverse range of views are considered before an outcome is decided. This can be compared with individual decision-making, where an individual comes to a decision taking into account the information and knowledge they have alone.

In a court process, parents and guardians of tamariki, or judges, usually have the sole decision-making role. There are often not many chances for whānau involvement in the court process. Court orders may not allow whānau to be involved in later decisions about the care of tamariki.

The legal effect of court orders, particularly adoption orders, may also conflict with the fluidity and openness of whāngai. Court orders are formal and require applications to the Court if they need to be changed. In addition, adoption orders conflict with the concept of whakapapa, as they change the legal whānau, hapū and iwi of tamariki. The legal effect of adoption orders is discussed under *Legal effect of adoption* at page 47.

When previous governments considered adoption law reform it was considered that whāngai should not be legally recognised by adoption law following consultation with Māori. At the time, difficulties with defining the concept and the need to allow for iwi-specific practices were noted.

### ***Options for change***

We want to understand the tikanga around whāngai and hear your views on whether there should be changes to the way the law treats whāngai. It may be thought that there should be changes to the status of whāngai arrangements, for example, by ensuring they can be legally recognised.

We want to work with Māori to understand whether a change is needed, and if so, to ensure that the law gives proper effect to whāngai arrangements. Targeted engagement with Māori will also be undertaken as part of the adoption reform process.

**Do you think there should be any changes made to the way adoption law treats whāngai?**

**If yes, what changes do you think should be made?**

**If no, why not?**

## **Customary adoptions**

Many cultures practice different forms of customary adoption. The reasons for customary adoptions can vary between cultures, but may include where parents aren't able to care for a child, to strengthen ties with another family, or to 'gift' a child to a relative.

Our adoption laws also don't recognise the customary adoptions of non-Māori cultures, however some parts of Aotearoa New Zealand's law recognise them in limited circumstances. For example, customary adoptions can be recognised for paid parental leave, the unsupported child benefit, or for immigration purposes.

Customary adoptions are particularly common in Pacific countries. Pacific peoples made up 8.1 percent of people counted in Aotearoa in the 2018 Census. Because of this it is important to think about how the concepts and principles of Pacific cultures, including customary adoption, could be included in Aotearoa New Zealand's laws.

Some common differences between customary adoptions in Pacific cultures and the law in the Adoption Act are set out below:

*Table 3: Differences between customary adoptions in Pacific cultures and the Adoption Act*

	<b>Customary adoptions</b>	<b>Adoption Act</b>
<b>Decision-making</b>	Collectively between the birth parents and the family or community group.	Decision is made by birth parents alone, and birth father's consent isn't always required. The Court has final decision-making power.
<b>Who can adopt</b>	Generally, the adoption is within the child's family or community group. Customary adoptions outside the family or community are rare and there will often be another strong existing link, such as a teacher or close family friend.	Largely based on the concept of stranger adoption, where a child is placed with adoptive parents who have no connection to the child's birth family.
<b>Level of government involvement</b>	Little to no oversight or involvement of the government.	Government involvement is required, and the Court has final decision-making power.
<b>Fluidity and openness</b>	Generally, 'open' in practice. The family or community group know about the adoption and the relationships.  Customary adoptions are not permanent and care arrangements can change over time.	Often 'open' in practice, but this isn't a legal requirement. No opportunity for family or community group involvement in the adoption process.  Adoption is permanent.
<b>Post-adoption contact</b>	Child generally maintains contact with their birth family and community group and knows about their care arrangements.	The law assumes adoptions are secret and supports the illusion that the child was born to the adoptive parents. The law doesn't support post-adoption contact between the child and birth family and community group.  Adoptive parents don't have to tell the child they are adopted. Rules restrict the child's access to information about their heritage.

Customary adoption practice can have a positive impact on the child. Contact after the adoption has happened helps the child to develop a strong sense of identity. Involving wider family and whānau can also ensure decisions are made in the child's best interests and that the child is placed within the family or community group.

### ***Issues with current approach***

As with whāngai or atawhai, a customary adoption does not give the customary adoptive parents legally recognised parental rights and responsibilities toward the child. This can affect both the customary adoptive parents and child in accessing services. While some customary adoptions may be formalised through a court order, the current law doesn't recognise the cultural needs or practices of those involved.

Some people will choose to formalise a customary adoption using an adoption order, as it creates new legal rights and responsibilities, including inheritance and immigration rights. However, the legal effects of an adoption order are different to many aspects of customary adoptions.

### ***Options for change***

Changes could be made to the way the law treats customary adoptions. For example, customary adoptions could be legally recognised in more circumstances with associated safeguards for the children involved, such as ensuring the customary adoptive parents have no relevant criminal convictions. This could happen through some type of certificate of recognition, or all customary adoptions could be automatically recognised via legislation.

Recognising customary adoption practices would mean the law incorporates the norms and practice of other cultures, better reflecting the cultural make-up of Aotearoa. It could also mean that other cultures would not have to rely on existing court orders to formalise relationships, which traditionally don't match those arrangements.

Alternatively, the law could stay as it is. The current approach allows cultural practices to continue without government interference. Existing family law court orders, such as guardianship or parenting orders, could be applied for where a child and caregiver's relationship needs to be formalised or recognised, without impacting the child's legal relationships with their birth family or community group.

**We want to hear your views on how customary adoptions of other cultures, in particular those of Pacific and other ethnic communities, are treated by the law. Do you think there should be any changes made to the way the law treats other customary adoptions?**

**What do you think about the options we've discussed?**

**Are there any other options you think we should consider?**

# How does the adoption process work?

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This section of the discussion document provides an overview of the adoption process in Aotearoa, including consent requirements, suitability criteria, court processes, the legal effect of adoption, and alternative care arrangements and orders. This section also outlines issues and options related to overseas and intercountry adoptions.

## Types of adoptions

Adoptions can be made in three ways under the law in Aotearoa: overseas adoption, intercountry adoption, and domestic adoption. Most adoptions recognised in Aotearoa today are overseas adoptions with Aotearoa New Zealand citizens or permanent residents as the adoptive parents.

### *What are overseas adoptions?*

Overseas adoptions are where both the adoptive parent(s) and child live in an overseas country. The law in Aotearoa recognises some adoptions made in overseas countries. This means that if the child and parents move to Aotearoa, they will have the same rights and responsibilities as other children and parents under Aotearoa New Zealand's law.

An example of an overseas adoption is where people living in the United Kingdom adopt a child there. The adoptive parents and child may later decide to move to Aotearoa, where the adoption could be recognised as valid.

### *What are intercountry adoptions?*

An intercountry adoption is where the adoptive parent(s) live in one country and the child lives in another country. In Aotearoa, an intercountry adoption might follow the Hague Convention process, or the process set out in our domestic law, which takes a Hague Convention-consistent approach where possible.

Examples of intercountry adoptions include:

- An Aotearoa based couple adopt a child living in China using the Hague Convention process. If the child is under 18 years old, this is a Hague Convention intercountry adoption as both China and Aotearoa are signatories to the Hague Convention.
- An Aotearoa based couple adopt a child living in Ethiopia. This is an 'other' intercountry adoption as Ethiopia isn't signatory to the Hague Convention (even though Aotearoa is) and the couple can adopt the child in the New Zealand Family Court following the domestic adoption process.

Some intercountry adoptions may use the overseas adoptions process. This may be the case where people from Aotearoa travel to another country and adopt a child under the other country's domestic law, but then return to Aotearoa.

*What are domestic adoptions?*

Domestic adoptions are where the adoptive parent(s) and child both live in Aotearoa. An example of a domestic adoption is where an Aotearoa based couple adopts a child who is also living in Aotearoa.

## Overseas and intercountry adoptions

There are different processes and requirements for overseas and intercountry adoptions.

### Recognition of overseas adoptions

Overseas adoptions are where both the adoptive parent(s) and child live in an overseas country.<sup>2</sup> Recognising overseas adoptions is important if those families travel or move to Aotearoa. They may need to provide evidence of their legal relationship to each other for a range of reasons.

Aotearoa New Zealand's law recognises adoptions made in overseas countries, if the adoption:

- is legally valid in the country it was made
- gives the adoptive parent's greater responsibility for the child's day-to-day care than the birth parents, and
- is made in a specific country<sup>3</sup> or gives the adoptive parents the same or greater inheritance rights than the birth parents.

Overseas adoptions that meet these criteria will have the same legal standing in Aotearoa as adoptions made in Aotearoa. Legal rights such as immigration and citizenship can flow from that recognition.

Where these criteria are not met, the adoptive parents are not recognised as the child's legal parents in Aotearoa. In these situations, the adoptive parents will often have to re-adopt the child in the New Zealand Family Court.

Recognising overseas adoptions can sometimes be used as another pathway for intercountry adoption and is discussed further under *Intercountry adoptions in an overseas court* at page 37.

#### ***Issues with the current approach***

Aotearoa relies on the other country to consider the child's rights, best interests and welfare when deciding to make the adoption. Some countries may not take some of the steps Aotearoa considers necessary to safeguard children's rights.

<sup>2</sup> The legal concept of 'habitual residence' is used to determine where someone legally lives and depends on a range of factors. For simplicity, this document doesn't refer to the 'habitual residence' concept.

<sup>3</sup> A Commonwealth country, the United States of America, a State or territory of the United States of America, or a country specified by the Governor-General by Order in Council.

For example, some countries may not consider the same types of information as Aotearoa or they may apply different standards of child protection when deciding on an adoption. In those cases, an adoption can place children's rights, best interests and welfare at risk. For example, it could create risks related to trafficking, slavery, or abuse.

Sometimes, the effect of an overseas adoption order will not meet the criteria described above. For example, an overseas adoption may not give the adoptive parents greater responsibility for the day-to-day care of the child than the birth parents. Our law won't recognise this adoption even though it's legally valid in the country it was issued. Re-adoption in Aotearoa takes time and can be costly which may not be possible for some adoptive parents.

### ***Options for change***

Changes to the law could focus on changing the criteria for recognising an overseas adoption. For example, the law could:

- Only require the overseas adoption to be legally valid in that country for the adoption to be recognised in Aotearoa. This would avoid instances where adoptive parents have to re-adopt their child simply because the laws of their country don't align with ours. However, there's a risk there could be a significant mismatch between the overseas law and Aotearoa New Zealand's law, meaning the adoption has a different effect in each country. There is also a risk that the overseas adoption doesn't sufficiently safeguard children's rights.
- Require evidence that the overseas adoption included safeguards to protect the child's rights. An overseas adoption wouldn't be recognised if it can't be shown the child's rights were upheld. For example, parents who have adopted children overseas could have their personal character considered before the adoption is recognised under Aotearoa law. However, there may be some practical difficulties with this approach. For example, if the overseas adoption took place a long time ago it may be hard to provide the evidence. It may also cause difficulties to Aotearoa New Zealand's relationships with other countries if we're seen to question the validity of another country's decision.

**Do you think changes should be made to the way Aotearoa recognises overseas adoptions?**

**What do you think about the options we've discussed?**

**Are there any other options you think we should consider?**



## Hague Convention intercountry adoptions

The Hague Convention has safeguards that make sure intercountry adoptions are in the best interests of the child. The Adoption (Intercountry) Act implements the Hague Convention in Aotearoa.

People in Aotearoa can adopt children from overseas countries where the other country is also signed up to the Hague Convention and Aotearoa has an agreement with that country.<sup>4</sup> The law of the other country, including who is able to adopt, also apply to the agreement. Aotearoa isn't a sending State, meaning that children in Aotearoa are not adopted overseas under the Hague Convention.

Some of the Hague Convention safeguards include ensuring:

- the child is legally available for adoption, meaning they have been deemed to need a new family outside of their own country.
- intercountry adoption is in the child's best interests.
- that placements in the child's own country have been considered.
- all relevant consents to the adoption have been given freely and in writing.
- the child's wishes and opinions have been considered.

In Hague Convention adoptions, the Central Authorities of the two countries involved will be in contact to facilitate the adoption. Facilitating the adoption includes preparing reports, such as a Home Study report, that outlines the potential adoptive parent's personal information and suitability and eligibility to adopt.

In Aotearoa, Oranga Tamariki is the Central Authority. Its social workers or an accredited body will prepare this report. The role of Oranga Tamariki and accredited bodies is discussed under *Government, the Court and accredited bodies* at page 24. A Child Study report is also prepared by the child's country that outlines their personal information, including any particular needs they might have.

Once both Central Authorities agree the adoption should go ahead, the adoption is finalised using the agreed process. Either Oranga Tamariki or the overseas Central Authority issues an Article 23 Hague Certificate of Conformity of Intercountry Adoption ('Article 23 certificate') confirming the adoption meets the Hague Convention requirements. This certificate finalises the adoption and the adoption is then recognised as valid under the law in Aotearoa.

The Registrar-General interprets the Hague Convention requirements to recognise the Article 23 certificate as being equivalent to an adoption order. The Registrar-General will then create a birth record on the Birth Register that can be used to create a birth certificate in Aotearoa, and can also be used to share information digitally (e.g. to enrol in school). Being able to get a birth certificate or share information digitally from the birth record is easier for parents and children to use in Aotearoa than an Article 23 certificate or foreign birth certificate.

<sup>4</sup> Aotearoa has agreements with the following countries: Thailand, Philippines, Lithuania, India, China, Hong Kong and Chile.

### ***Issues with the current approach***

The child's citizenship status depends on which country issues the Article 23 certificate. The law says that the adopted child is to be treated as if they were born where the adoption order was made.

If the Article 23 certificate is issued in Aotearoa, the child is entitled to Aotearoa New Zealand citizenship by birth. If the Article 23 certificate is issued in the other country, the child is entitled to Aotearoa New Zealand citizenship by descent. Citizenship by birth can be passed on to your children, citizenship by descent cannot.

### ***Options for change***

The law could be changed to ensure that children adopted under the Hague Convention are treated the same for citizenship purposes, no matter where the Article 23 certificate was issued.

**Do you think changes should be made to the way the Hague Convention adoptions happen in Aotearoa?**

**What do you think about the option we've discussed?**

**Are there any other options you think we should consider?**

## **Other intercountry adoptions**

Our current law also allows intercountry adoptions to take place that fall outside of the Hague Convention process. These other intercountry adoptions can be made either by:

- the New Zealand Family Court, or
- adoption orders made in overseas courts which are subsequently recognised by Aotearoa.

## **Intercountry adoptions in the New Zealand Family Court**

Our adoption law allows anyone to make an application from anywhere, regarding any child, anywhere. The applicant or child could be living anywhere in the world and use Aotearoa New Zealand's laws to adopt. As the application is made in the New Zealand Family Court, it then follows our domestic adoption process.

An 'other' intercountry adoption doesn't need to comply with the Hague Convention safeguards. Despite this, the Court has said that the principles of the Hague Convention should apply. This means the Court will consider if the child needs a new family which can't be provided in their own country, if the child is able to be adopted, and if the child is eligible to immigrate to Aotearoa.

### ***Issues with the current approach***

It is unusual for a court in Aotearoa to be able to make decisions about people or matters that aren't connected to Aotearoa. Other countries could see this as inappropriate.

When the child or adoptive applicant lives overseas it may be hard for the Court to get the information it needs, or to confirm the accuracy of this information. It could be hard to confirm the child's identity or decide that the adoption is in the child's best interests. There are significant risks if the child is living in a country where government resources are scarce and there is no established process for accessing adoption documents or information about the child (including their identity), or the information may not be reliable. Not having reliable information about the applicants and the child can make it hard and risky for the Court to decide whether an adoption is appropriate.

The current approach also allows people living overseas to make an application in the New Zealand Family Court to bypass their own country's laws. This could be where there would be difficulties adopting in their own country. For example, some countries only allow adoptions of children where the child is illegitimate or an orphan.

### ***Options for change***

The law could be changed to:

- Require either the child and/or the adoptive parent(s) to live in Aotearoa. This would ensure there is a genuine connection to Aotearoa and that the New Zealand Family Court has access to better information.
- Only allow intercountry adoptions that follow the Hague Convention or an equivalent process.
- Allow Aotearoa to negotiate intercountry adoption agreements with other countries, which could have similar safeguards to the Hague Convention process. The law could say that these are the only types of intercountry adoptions that can happen outside of the Hague Convention. Maintaining intercountry adoption agreements may be resource intensive but could make sure that children's rights are protected.

**Do you think changes should be made to the way other intercountry adoption orders in the New Zealand Family Court are treated?**

**What do you think about the options we've discussed?**

**Are there any other options you think we should consider?**

### **Intercountry adoptions in an overseas court**

Some intercountry adoptions take place using the process for recognising overseas adoptions, rather than a formal intercountry adoption process. For example, an Aotearoa New Zealander (either a citizen or permanent resident) can go overseas to adopt a child using another country's adoption process. Once the overseas adoption is finalised, it can be recognised under the law in Aotearoa if the criteria are met.

In 2020, approximately 820 children adopted overseas were granted citizenship by descent, the majority of whom were from Pacific Island countries.<sup>5</sup> Other children adopted overseas by Aotearoa New Zealanders (including both citizens and residents) have been granted resident visas.<sup>6</sup> Some of the Aotearoa New Zealanders who have adopted children overseas may be living in those countries, but others will probably have travelled to the country for the purpose of adopting a child.

### ***Issues with the current approach***

There is a risk that overseas countries laws and adoption processes don't align with Aotearoa New Zealand's expectations around protecting children's rights. People living in Aotearoa can bypass domestic adoption laws, by going to another country to adopt where there may be fewer checks. Recognising these adoptions can place children's rights, best interests and welfare at risk once they enter Aotearoa. Where this happens, those children may come to the attention of Oranga Tamariki for care and protection concerns.

### ***Options for change***

The law could be changed so that:

- Aotearoa only recognises overseas adoptions where both the child and the adoptive parents lived overseas at the time of the adoption. The law could also say that they had to live overseas for a certain amount of time at the time the adoption was made. This would mean Aotearoa New Zealanders could not bypass our adoption laws by going to an overseas court that may not have child protections that align with those in Aotearoa. Aotearoa New Zealanders or others genuinely living overseas at the time of the adoption could still have the adoption recognised in Aotearoa.
- Only intercountry adoptions that fall under the Hague Convention or an equivalent process are allowed.

**Do you think changes should be made to the way other intercountry adoption orders made in overseas courts are treated?**

**What do you think about the options we've discussed?**

**Are there any other options you think we should consider?**

<sup>5</sup> Children are entitled to citizenship by descent if they are adopted overseas by an Aotearoa New Zealand citizen and are under 14 years old at the time of their adoption.

<sup>6</sup> If a child is 14 years or older at the time they are adopted by an Aotearoa New Zealand citizen, they can obtain a resident visa. If a child is adopted overseas by a permanent Aotearoa New Zealand resident, regardless of their age, they can obtain a resident visa.

# Domestic adoptions in Aotearoa

Domestic adoptions are approved by the New Zealand Family Court. The Family Court must be satisfied that certain requirements have been met, including that, for example, the right people have agreed to the adoption and the applicants are fit and proper to provide care for the child.

## Consent

### Who consents to an adoption?

The parties who must agree to an adoption (also known as ‘providing consent’) is an important part of Aotearoa New Zealand’s adoption law. Currently, the law only requires the child’s parents or guardians to agree to the adoption. In practice, this often means the birth mother and birth father.

A birth father’s agreement isn’t needed if he and the birth mother weren’t married between the child’s conception and birth, or if he isn’t listed as a guardian on the child’s birth certificate. Oranga Tamariki encourage birth mothers to involve the birth father during the adoption process, but this isn’t required if the birth father doesn’t have to agree.

#### *Issues with the current approach*

Sometimes a birth mother will choose not to involve the birth father when deciding whether to place a child for adoption. Birth fathers have limited opportunities to be involved in the adoption process if they are not recognised as a legal parent. Some people think that not requiring the birth father’s agreement in all cases devalues the rights of birth fathers.

Currently, while their wishes must be considered, the child being adopted doesn’t need to agree to the adoption. This is the case even if the child is old or mature enough to understand the impact of adoption. For example, a 19-year old’s agreement isn’t needed, even though many 19-year olds live independently. The law currently doesn’t align with other parts of Aotearoa New Zealand’s law that sees many children, particularly older children, as autonomous rights-holders and being capable of making important decisions. Children’s rights in the adoption process are discussed further under *Children’s rights in the adoption process* at page 14.

The child’s family, whānau, hapū or iwi also doesn’t need to agree to the adoption. Some people may think that this doesn’t recognise the important role the child’s family, whānau, hapū or iwi play in their life and the influence they might have over their upbringing. It may also be inconsistent with collective decision-making that is common in some cultures, including Māori and Pacific cultures.

On the other hand, some may think the adoption decision sits best with the birth parents, who are legally responsible for caring for the child. In some cases, requiring the agreement of the family, whānau, hapū and iwi could put undue pressure on the parents not to place their child for adoption, which may not be in the child’s best interests. There may also be some situations where requiring agreement from the family or whānau could be inappropriate due to safety risks or significant family breakdown.

## Options for change

The law could be changed to require:

- The birth father to agree to the adoption, regardless of marriage and guardian status. It may take time to locate and notify the birth father where the birth parents are not in contact. This would treat birth mothers and birth fathers equally. There may be situations where getting the birth father's agreement would be inappropriate. For example, if the child was conceived as a result of a criminal offence or where it might put the birth mother or child's life at risk.
- Children to agree to their adoption. A child's agreement could be required once they reach a certain age, or when they are mature enough to be able to understand the effect of their decision. Other requirements could be included to make sure the child is provided with age-appropriate information to make sure they can make a free and informed decision.
- Family and whānau to agree to the adoption. This recognises that the child is a part of their family, whānau, hapū and iwi. Some people may have concerns about taking decision-making away from the birth parents and about possible privacy issues. It could also be inappropriate where the birth parent's relationship with their family and whānau doesn't exist, is strained or where there are safety concerns.

Other countries require a child to agree to their adoption. For example:

- Some Australian states require a child to consent to an adoption if they are 12 years or older
- In France, the child's consent is required if they are 13 years or older

**Who do you think should have to agree to the adoption? In particular, we want to hear your views on whether the following groups of people should need to agree to an adoption:**

- **The child to be adopted**
- **Birth father**
- **Birth family and whānau**

**What do you think about the options we've discussed?**

**Are there any other options you think we should consider?**

**Do you think there are any situations where requiring agreement from certain parties would be inappropriate?**

## Timing of consent and withdrawing consent

The earliest a birth mother can agree to an adoption is when the child is at least 10 days old. In practice, this is usually at least 12 days after the child is born (or 10 working days). This gives birth parents a short time following the child's birth to think about their decision before they commit to adoption.

The law says that where birth parents agree to an adoption by specific adoptive applicants, they can't change their minds (also known as 'withdrawing') their agreement:

- while the application is being processed, or
- until the adoptive applicants have had reasonable chance to apply to adopt the child.

Where agreement to an adoption is given without reference to specific adoptive applicants, there are no rules about what happens if the birth parents change their mind and want to take back their agreement.

### ***Issues with the current approach***

Evidence suggests that the 10-working day timeframe for a birth mother to provide their agreement may be too short. The physical and psychological effects of giving birth can mean that it is a particularly vulnerable time for birth mothers.

On the other hand, some birth mothers (and birth parents) may be certain in their decision to place the child for adoption and want the adoption to be finalised as soon as possible.

The 10-working day timeframe may be considered to be too long of a waiting period in those cases.

Other countries require a longer period after the child is born until agreement can be given. For example:

- Some Australian states require consent to be given 30 days after birth
- The United Kingdom requires consent to be given 42 days after birth

The law on withdrawing consent provides more certainty to applicants that their application will go ahead. However, it can also make it difficult for birth parents to take back their agreement if they change their mind.

### ***Options for change***

The law could be changed to:

- Adjust when birth parents are able to agree to an adoption. For example, it could give a longer time period before the birth parents can agree to the adoption. This would give more time for the birth mother to process and heal from the physical and psychological effects of giving birth. Where the birth father isn't already involved, there would be some more time to find and speak with them, and potentially the birth family and whānau. On the other hand, a longer agreement period would delay the adoption process for birth parents who are certain in their decision and want the adoption to be finalised as quickly as possible.
- Allow a certain time for birth parents to withdraw their agreement. This would provide birth parents with some protection against rushed decision making and reflects the significance of the decision. This would also create uncertainty for adoptive parents and delay the adoption process, which may not be in the child's best interests.
- Only allow birth parents to agree once they have received counselling and support. Counselling and support could help the person to understand the implications of the adoption and ensure their agreement is fully informed.
- Allow birth parents access to free legal advice to ensure they are fully informed of the legal consequences agreeing to an adoption.

All the options discussed add more time to the process, which may delay when the adoptive parents can begin creating a bond with the child and may not be in the child's best interests. On the other hand, taking more time may make sure the decision is made in the best interests of the child by helping those involved fully understand the implications of adoption. This may also reduce the risk that they later regret their decision.

**When do you think agreement to an adoption should be able to be given?**

**Do you think agreement to an adoption should be able to be withdrawn?**

**If yes, when do you think agreement to an adoption should be able to be withdrawn?**

**What do you think about the options we've discussed?**

**Are there any other options you think we should consider?**

## **Dispensing with consent**

In some situations, the Family Court can make adoption orders without the agreement of one or both birth parents. This is known as 'dispensing with consent'. If an application to dispense with consent is made, the Court may only do so if:

- the parent or guardian mistreated the child. This means the parent or guardian has either abandoned, neglected, consistently failed to look after and care for, or consistently ill-treated the child, or
- it considers that the parent or guardian is unfit to look after the child because of a physical or mental incapacity, meaning they cannot have care and control of the child. Any physical or mental incapacity must also be likely to continue indefinitely.

Disability rights advocates have criticised the second ground to dispense with consent as it can discriminate against people with disabilities. Advocates argue that the law assumes people with disabilities aren't suitable parents and that these assumptions aren't made about non-disabled parents.

### ***Options for change***

The grounds for dispensing with consent could be changed. For example, to:

- Remove the ability for the Court to rely solely on a mental or physical incapacity for dispensing with consent. This could better protect the rights of birth parents with disabilities. It may also better reflect what is in a child's best interests, as a person's mental or physical incapacity won't necessarily mean they aren't able to raise a child. Removing this ground only would mean that agreement could still be dispensed with where a birth parent has mistreated a child.
- Include more circumstances where consent could be dispensed with. For example, the agreement of a birth parent could be dispensed with if they committed a criminal offence which resulted in the child being conceived, or where the birth parent is unable to be identified or located.



- Remove the ability to dispense with consent altogether. This would mean that all relevant people's agreement would be needed in every case, even if the person was not able to be found. This could lead to delays in adoptions being processed. It may also mean an adoption isn't able to happen at all, which may not be in the child's best interests.

**Do you think consent should be able to be dispensed with?**

**What do you think about the options we've discussed?**

**Are there any other options you think we should consider?**

## Suitability to adopt

The law requires that adoptive applicants to be suitable to adopt. Before the Court makes an adoption order, it must be satisfied that the adoptive applicants are 'fit and proper' people to provide day-to-day care for the child and are of sufficient ability to bring up, maintain and educate the child. The law doesn't include specific criteria to help the Court decide who is 'fit and proper'.

In almost all adoption cases, the Court will ask for a social worker report to be prepared that assesses the adoptive applicant and helps the Court decide if they are suitable to adopt the child. Usually, an Oranga Tamariki social worker will prepare the report. The law says that where both the child and adoptive parents are Māori, a Māori person must prepare the social worker report.

Oranga Tamariki has developed criteria to help its social workers assess if adoptive applicants are suitable, based on the needs of the child. This process involves gathering information about the applicants, such as proof of identity, immigration status, residency and/or citizenship, police and care and protection vetting, medical reports, referee checks and residential addresses. Oranga Tamariki then uses a Caregiver and Adoption Assessment Framework to assess the capability and capacity of adoptive parents to nurture and develop the wellbeing of the child. As the Framework isn't set out in law, it's able to adapt over time. Adoptive parents' capability and capacity to raise the child are covered in the social worker's report to the Court.

Domestic adoption applications usually follow one of two pathways, which affect how long it takes Oranga Tamariki to prepare the social worker report:

### 1. Adoption applications via Oranga Tamariki

People can apply to Oranga Tamariki to enter its pool of approved potential adoptive parents. Once approved, their profile can be shared with birth parents thinking about placing their child for adoption. In these cases, the suitability of adoptive applicants is pre-assessed. This means the birth parents have the certainty of knowing the applicants they select are considered safe and suitable to adopt. When they apply to the Court for an adoption order they are likely to meet the criteria for making an order. This can also result in a faster adoption process.

## **2. Direct applications to the Court**

Sometimes adoptive parents will apply directly to the Court to adopt a child, without ever dealing with Oranga Tamariki. These are known as independent adoptions. For example, this might happen when a birth relative or step-parent is applying to adopt the child, or when the adoption has been arranged directly with the birth parents.

Adoptive parents in direct applications to the Court still have their suitability assessed by an Oranga Tamariki social worker, so that independent information about their suitability is given to the Court. There may be delays in preparing a social worker report as they need to start from scratch when gathering information, interviewing the applicants and assessing their suitability. In these cases, delays may affect how long it takes for an adoption application to be decided.

### *Factors the Court considers when assessing suitability*

As the current law doesn't say what makes an adoptive applicant suitable to adopt, the Court has developed and adapted a range of factors over time. The Court will decide on a case-by-case basis how much weight to give each factor. Some of the factors the Court will assess include:

- Child's safety and identity. This includes whether the adoptive parents have another adult or child in the household that may pose a risk to the child's safety. It also may look at the adoptive parents' plan to tell the child about their adoption and their birth parents.
- Mental and physical health of the adoptive parents. Adoptive parents' mental and physical health is usually only considered if it is likely to affect their ability to care for the child.
- Criminal convictions of the adoptive parents. Having a criminal conviction doesn't automatically exclude adoptive parents from being 'suitable' to adopt, but the type of offence, seriousness, number and timing will be important. The Court is likely to pay particular attention to convictions relating to illegal drugs, violent offending, child abuse or neglect, sexual or other serious offending.

### *Issues with the current approach*

As the law doesn't say what makes a person suitable to adopt, who can be considered 'fit and proper' has been able to change over time to match society's expectations. However, it can also create uncertainty for adoptive applicants, who may not know what criteria they need to meet to be able to adopt a child. It also means there is no clear standard for what makes a person unsuitable to adopt.

### *Options for change*

The law could be changed to:

- Say what types of information must be included in the social worker's report. For example, it could say that certain health, criminal, financial, immigration status and police vet information must be included.

- Include suitability criteria or a test for the Court to use to assess whether an adoptive parent is suitable to adopt. This would mean there would be clear guidelines on who can adopt, and adoptive parents would need to meet them to be able to adopt the child. However, these changes could remove discretion from the law, making it more difficult to adapt over time.
- Specify who will not be considered suitable to adopt. For example, specific criminal convictions could disqualify a person from being able to adopt.

**Do you think the law should specify criteria to assess whether a person is suitable to adopt a child?**

**Do you have any views on the types of criteria that should be used?**

**What kind of factors do you think would make a person unsuitable to adopt?**

**What do you think about the options we've discussed?**

**Are there any other options you think we should consider?**

## Court processes

The majority of adoptions in Aotearoa are made by the Family Court. Currently, the law requires the Court to make an interim order before it can make a final adoption order. An interim (temporary) order usually lasts for between 6 months and 1 year. Interim orders are considered by some people as a type of 'trial period' for the child and the adoptive parents. Adoptive parents can experience parenting the child and Oranga Tamariki can monitor the adoption to make sure it is working for the child.

The Court can issue a final order straight away if there are special circumstances, which have included where:

- There have already been lengthy delays in the case.
- The child was born by surrogacy.
- The child has been abandoned.
- The child is being adopted by a parent and step-parent who the child has treated as their parent for many years.

Interim orders can be beneficial, as they give the birth parents time to adjust to the changed relationship with the child and provide adoptive parents time to work through any concerns or anxieties. It also gives an opportunity to see if the placement isn't suitable for the child before a permanent order is made.

### *Court powers*

The Family Court can consider any evidence that it thinks is relevant to the adoption application. In most cases, the Court will receive a social worker's report that provides an assessment of the adoptive applicant's suitability to adopt. The Court can also appoint a lawyer to assist the Court to provide additional information on the case or the law.

Sometimes, the lawyer to assist the Court will provide information on the child's views on the adoption.

In some cases, the Family Court may add a government agency as a party to an adoption case if it thinks it has a proper interest and would assist the Court in its decision-making. For example, Immigration New Zealand may be added as a party if the adoption means a child will get the right to move to and live in Aotearoa.

### ***Issues with the current approach***

Some people think that the court process takes a long time to complete. It can also have high costs, as a lawyer is usually needed to work through the court process and present evidence to the Court. The costs and time involved may mean that some people in Aotearoa, or groups of people in Aotearoa, aren't able to access the adoption process.

### ***Interim orders***

While it has benefits, the interim order process may give less certainty for the child and the adoptive parents. This may make it difficult for their relationship to develop due to a fear that the child may be removed from the adoptive parent's care. As final orders are made in the large majority of cases, this additional step may also be seen as unnecessary.

### ***Court powers***

The Family Court has limited powers to request reports or the involvement of professionals to help it make decisions. Under other family laws, the Family Court can order specialist reports, including cultural, medical, psychological or psychiatric reports. Specialist reports can give the Family Court more information about the child's background and help make better informed decisions.

There is no power for the Court to appoint a specific person who can represent the child's interests in the court process and explain the court process to the child. In other types of cases involving children, the Court can often appoint a lawyer for child. A lawyer for child will also make sure the Court is told what the child thinks and any other information relevant to their welfare and best interests. The Family Court sometimes gets this information for adoption cases in a different way by appointing a lawyer to assist the Court, but these lawyers aren't usually specifically trained as lawyers for children.

### ***Options for change***

There are options for changing the types of orders the Court must make. For example, the rules around interim orders could be changed so that the requirement to make an interim order:

- is removed completely, or
- only needs to be made in limited circumstances. For example, where the adoptive parents are not already known to the child. This could give children and adoptive parents more certainty earlier on and may speed up the adoption process.

The Court's powers could be extended so it has access to better information, for example by allowing it to:

- Order specialist reports, such as medical, cultural, psychiatric or psychological reports. Cultural reports are discussed under *Culture and adoption* at page 26.
- Appoint a lawyer for child (or another type of child's advocate).
- Request additional evidence from people outside of the application, but who have a connection to the child.

**Do you think changes should be made to the types of orders the Court must make in adoption cases?**

**Do you think the Court should have powers to request other information and reports?**

**What do you think about the options we've discussed?**

**Are there any other options you think we should consider?**

## Legal effect of adoption

The law says adoption is a permanent legal arrangement. When an adoption order is made, birth parents give up all legal and parental rights over the child, and the adoptive parents have full legal and parental rights toward the child.

The law makes it look as if the adoptive parents gave birth to the adoptive child. This has a number of practical consequences:

- A new birth certificate is created which lists the adoptive parents as the child's parents. There is no reference to the birth parents.
- Adoptive parents can change the child's name without the child's agreement.
- Any laws about inheritance for the child applies only to their adoptive family. This means the child cannot inherit from their birth family and whānau, unless they're specifically provided for in a will.
- After the adoption birth parents don't have to pay child support for the child.

In most adoptions today, the child knows about and often has contact with their birth family and whānau. This can involve the adoptive and birth parents making an agreement around what relationship and/or contact the birth parents have with the child. Contact agreements are not legally enforceable. Contact after an adoption is discussed further at under *Alternative care arrangements and orders* at page 49.

Openness usually helps the child develop a sense of identity and self-confidence, and maintain whakapapa connections. Oranga Tamariki actively encourages openness throughout the adoption process. However, adoptive parents do not legally have to tell the child about, or stay in contact with, the birth family and whānau, or tell the child that they have been adopted.

## ***Issues with the current approach***

The current rules reflect views from the 1950s when the Adoption Act was written, which considered that adoptions should be 'closed' and that it was best for there to be a 'clean break' between birth and adoptive families and whānau.

Many people have criticised the legal effect of adoption as it hides the existence of the child's birth family and whānau. Research now shows that secrecy and closed adoptions are harmful. Unless the child is told about their birth family and whānau by their adoptive parents, they have to wait until they turn 20 years old before they can request information about their birth parents.

Legally 'replacing' a birth family and whānau with the adoptive parents also doesn't fit with many customary care arrangements and is considered offensive by some cultures. For example, in te ao Māori, whānau and whakapapa cannot be undone by law and are an inherent part of a person's identity.

The effect of the current law can also impact on the ability for people who are adopted to participate in Waitangi Tribunal claims and benefit from any settlements.

## ***Options for change***

We have identified options for changing the legal effect of adoption that continue to recognise a legal relationship with the birth parents while recognising the permanent legal and parenting role played by adoptive parents. Options include:

- Recognising both the birth parents and the adoptive parents as the child's legal parents, but the adoptive parents have additional responsibilities. This could mean the adoptive parents have day-to-day care of the child and are the child's primary guardians. The birth parents could still keep some parental responsibilities to the child – these could be decided on a case-by-case basis depending on the role they will continue to play in the child's life. This could be a way to be a way to legally recognise 'open' adoption arrangements (discussed further below).
- Recognising both the birth parents and adoptive parents as the child's legal parents, but only the adoptive parents have full parental rights and responsibilities toward the child. This could be similar to situations under the Care of Children Act which allows the Court to remove a legal parent's guardianship and parental responsibilities, and create new guardians, but the law still recognises them as the child's parent.

## ***Inheritance and child support***

Changes could also be made to the inheritance rights and child support obligations after an adoption.

A person can say in their will who should inherit their property. If the person doesn't have a will, our inheritance laws say which family members should inherit the property. Family members can also challenge a person's will if they consider the deceased person had a duty to provide for them. The law could:

- Stay the way it is, so that it only recognises the relationship between the person who has been adopted and the adoptive family. The person who has been adopted could still inherit property from the birth family if that is what the will says.

- Recognise the person who has been adopted as a family member of both birth parents and adoptive parents for our inheritance laws. This would mean, for example, they could inherit from a birth parent who died without a will.

Another question is whether or not birth parents should have to pay child support after an adoption. The law could:

- Stay the way it is, so that birth parents do not have to pay child support once an adoption order is made.
- Say that birth parents still have a duty to pay child support toward the child following an adoption.

**Do you think the legal effect of an adoption should change?**

**What do you think about the options we've discussed?**

**Are there any other options you think we should consider?**

**What do you think succession and maintenance rights should be after an adoption?**

**What do you think about the options we've discussed?**

**Are there any other options you think we should consider?**

## Alternative care arrangements and orders

Adoption is a permanent way of changing care arrangements for a child when their birth parents cannot care for them. Other types of care arrangements or orders, such as guardianship orders, can have less severe and permanent legal effects than adoption, meaning the child can stay connected to their birth family and whānau. The law doesn't need other types of care arrangements to be considered when deciding whether a child should be adopted.

Other parts of Aotearoa New Zealand's family law say it is important for children to have relationships with their parents, family and whānau. For example, the Oranga Tamariki Act says decisions should have regard to mana tamaiti (tamariki) and the whakapapa of Māori children and young persons and the whanaungatanga responsibilities of their whānau, hapū and iwi. There is now also more recognition that a child's identity should be preserved and strengthened.

### ***Issues with the current approach***

As there is no requirement to consider alternative orders, adoptions may be made in cases where another type of order would be better suited to the situation.

The law also doesn't provide legal protections for the birth parents or birth family and whānau to stay in contact with the child once they have been adopted. As part of the adoption process, birth and adoptive parents sometimes agree on how they will keep up contact and maintain a relationship between the birth family and the child. These contact agreements can't be legally enforced, which reflects the practice of 'closed' adoptions at the time the law was created.

In practice, Oranga Tamariki social workers explain the importance of supporting children to maintain their links with their birth family and whānau and their identity. This includes encouraging birth parents to think about whether there are other ways the child could be cared for. This is particularly important for tamariki Māori to maintain their whakapapa links to their whānau, hapū and iwi.

If a direct adoption application is made to the Court, the birth parents may not have looked at alternative care options or considered how they would stay in contact with the child after the adoption.

Once an adoption application gets to the Court, there is no legal requirement for the Court to think about other possible care options or post-adoption contact arrangements. Despite this, the Court sometimes does consider these factors. In some cases, the Court has granted other orders at the time it makes an adoption order, such as an additional guardianship order so that the birth parents continue to have an enforceable right to stay in contact with the child.

### ***Options for change***

There are a number of ways the law could encourage the consideration of adoption alternatives and support contact after an adoption. This could highlight the significant, life-long effects adoption has on the child, the birth parents and the wider family and whānau.

For example, the law could refer to ‘open’ adoption, post-adoption contact and the need to consider alternative care arrangements in a principles or purpose section. This would reflect adoption practice and highlight the importance of maintaining whakapapa ties and the child’s right to be cared for by their family and whānau.

Other options for ensuring that alternatives to adoption are considered could include requiring:

- Social workers to tell birth parents about the alternative care options available and report on those alternatives to the Court.
- The Court to be satisfied other care options have been considered and that adoption is most appropriate or that there are no other suitable care options.
- Other care options to be considered in certain cases, such as where the adoptive applicants are relatives of the child or one is a step-parent.

Other options could encourage and support post-adoption contact between the child and their birth parents. For example:

- Requiring a post-adoption contact agreement to be included in an adoption application, unless it is inappropriate to do so. This would ensure that the birth and adoptive parents have thought about how post-adoption contact would happen in practice. The Court could also use the contact plan to decide whether the adoption is in the best interests of the child.
- Requiring the Court to think about whether other orders (such as a parenting order for contact) should be made between the child and birth parents once an adoption is made. This would be one way of ensuring that the child has ongoing contact with the birth family and whānau and maintain cultural connections.



### *Post-adoption contact agreements*

There is currently no formal support for adoptive parents and birth parents relating to contact agreements after an adoption, as the agreements can't be legally enforced. Even with the best of intentions, peoples' circumstances change over time and there may be differences of opinion about what contact is appropriate as the child grows up.

Changes could be made to ensure there is some regulation of post-adoption contact agreements, such as:

- Offering a mediation service for when there are disagreements about a contact agreement. The birth parents and/or adoptive parents could apply to the service for supported mediation. This could allow for culturally responsive mediation services to be offered and reflect a child-centred process to resolving a dispute.
- Offering support for updating or changing contact agreements to reflect that the needs of those impacted by the adoption may change over time.
- Making contact agreements legally enforceable. This could, for example, include a penalty involved if there was a breach of the agreement, but may be less flexible as circumstances change over time.

**Do you think alternative court orders should have to be considered in adoption cases?**

**What do you think about the options we've discussed?**

**Are there any other options you think we should consider?**

**Do you think the Court should also think about making other types of care or contact orders after it makes an adoption order?**

**What do you think about the options we've discussed?**

**Are there any other options you think we should consider?**

## **Discharging an adoption order**

An adoption order can only be varied or discharged (cancelled) in a very limited range of circumstances. If an adoption order is discharged, the child is legally no longer a child of the adoptive parents and goes back to legally being the child of their birth parents. An adoption order can only be discharged where:

- The birth parent's agreement to the adoption was gained through fraud, deception or force.
- False evidence was used to make the adoption decision.
- There has been an important factual mistake in the case.

There are no criteria in our current law about who can apply to the Court to discharge an adoption order, but the Attorney-General must give permission for the application. The Court has accepted that anyone who was involved in the original adoption case can apply to discharge an adoption order, but this doesn't include wider family and whānau. Most

applications have been made by people who have been adopted, once they are adults. Between 2003 – 2020, there were 19 applications for an adoption order to be varied or discharged, with 14 of those applications granted and one still being considered.

### ***Issues with the current approach***

The limited circumstances for discharging an adoption emphasise the significance of a final adoption order once it is granted. However, this also means there are significant barriers and costs where there is a genuine reason to discharge the adoption order.

Discharging an adoption order may be in a child's best interests, for example, where the child has been neglected or abused and removed from the adoptive parent's care. The lack of clear criteria around who can apply for the discharge and when means that sometimes the Court takes different approaches about how and when an order can be discharged.

### ***Options for change***

The law could be changed so it is clearer on who can apply to discharge an order, when they can apply and on what grounds an order can be discharged on.

Who is able to apply to discharge an adoption order could be changed to:

- Make it clear who can apply to discharge an adoption order. This could reflect current practice and include the person who has been adopted, birth parents, and the adoptive parents.
- Allow family and whānau to apply for a discharge, reflecting the important role family and whānau play in the child's life.

The grounds for discharging an adoption order could be changed. For example, an adoption order could be discharged if:

- The relationship between the adoptive parents and child has completely broken down.
- The child, birth parents and adoptive parents all agree to discharge the adoption order.
- The Court believes it would be in the child's best interests. This would provide the Court with additional flexibility.

**Do you think changes should be made to when an adoption order can be discharged?**

**What do you think about the options we've discussed?**

**Are there any other options you think we should consider?**

# Impacts of adoption

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This section of the discussion document describes the impact adoption can have on people involved. It discusses impacts on the right to identity, access to information and support, birth certificates following an adoption, and access to adoption information.

## Identity and adoption

Identity is an important part of a person's wellbeing. Identity and connectedness can strengthen a person's confidence and ability to cope with challenges, helping them to deal with different situations in life.

Identity means different things to different people. For some, it might be knowing their place in their family and whānau or being connected to their culture, whakapapa, whenua, religion or language. For others, identity might be linked to their personality, beliefs, characteristics or looks. Identity helps people connect with others and give them a sense of belonging.

A child's right to identity is protected by Article 8 of the Children's Convention. The right to identity includes the right to their name, nationality and family ties. If a child is deprived of their identity, the government must provide assistance and protection to re-establish their identity. A child's right to culture is also protected by Article 30 of the Children's Convention. This right includes the right to practice their religion and speak their language. Te Tiriti o Waitangi also provides rights of identity, language and culture to Māori.

### *Issues with the current approach*

There is lots of evidence that people who are adopted can struggle to establish a sense of identity, particularly for those who were adopted in the era of closed adoptions. The significant changes resulting from an adoption can remove aspects of a person's life that many people view as central to their identity and who they are. People adopted from overseas, or into families who have a different culture or ethnicity, may find it hard to learn about their culture or heritage. Not knowing or understanding their identity can also effects on the family and whānau of a person who has been adopted and the generations that come afterwards.

In most adoptions these days, the child, birth parents and adoptive parents have some kind of ongoing relationship. However, the Adoption Act continues to restrict access to information about a person's identity.

The child's birth parents are replaced with the adoptive parents. The child's name can be changed, and adoptive parents aren't required to tell the child their adoption status. There are also no ways to make sure the child has the opportunities to maintain ties with their birth family (including siblings), culture, language and whakapapa. Restrictions on access to adoption information can stop the person who is adopted from exploring their identity, including who they are and where they came from.

Other parts of Aotearoa New Zealand's family law recognise the right to identity. For example, the Care of Children Act says that, in relation to a child's welfare and best interests,

their identity should be preserved and strengthened. Similarly, the Oranga Tamariki Act says that a child or young person in care should receive special protection and assistance to address their particular identity needs.

### ***Options for change***

A key focus for adoption law reform is making sure that children's rights, best interests and welfare are protected throughout their life, including the right to identity.

Many parts of the adoption process impact on the adopted person's identity. Specific options for change are discussed below in relation to ongoing support services, birth certificates, and access to adoption information.

## **Adoption support services**

Adoption support will be different for every person involved. Some people may not need much support at all, while others may require more. Equally, some may need support early in the adoption process, some may not need support until later in life, and others may need support all the way through.

Where Oranga Tamariki is involved early in the adoption process it offers information, training, and support services to birth parents and adoptive parents. People choose whether to use these services. There is no specific government funding for adoption support services, and the law doesn't require any pre, during or post-adoption support in domestic adoption cases.

There is also little public information available about adoption and the emotional and psychological impacts on those involved, outside of the Oranga Tamariki process.

### ***Issues with the current approach***

The current adoption system doesn't recognise that people impacted by adoption may need access to ongoing support. In many cases these days, adoption placements result in positive outcomes for children and the child can continue to have a relationship with their birth parents and birth family and whānau. Despite this, many people involved in adoption can have ongoing challenges:

- Children who are adopted may find it difficult to transition to a new family unit. People who have been adopted may have feelings of grief and a loss of identity later in life.
- Birth parents may find adopting out a child painful and experience a feeling of loss. They may also find it hard to maintain contact arrangements following the adoption.
- Adoptive parents may feel well-prepared to care for the child before the adoption. However, they may find the transition after adopting difficult and may also find it hard to maintain contact arrangements following the adoption.
- Family and whānau members may find the adoption of a child a difficult decision to process, including what it means for their contact and role with the child post-adoption.

It is now well known that adoption, particularly 'closed' adoptions, can cause trauma for the child and the birth parents. People impacted by adoption will often need ongoing support, which can change over time. The law doesn't recognise the trauma that adoption can cause

and doesn't provide for ongoing support services. People who voluntarily seek support services usually need to pay for them themselves, which can create inequities for people who want to access those services.

As there is not much public information available about the impacts of adoption, some birth parents may not fully understand its implications before choosing to place a child for adoption. It also may mean that birth parents and adoptive parents are unprepared for how they feel once an adoption has happened. Children might also find it hard to understand what is happening if they are not given age-appropriate information.

### ***Options for change***

Changes could be made to make sure that appropriate information and support is provided to the child, birth parents and adoptive parents before, during and after an adoption. This could be an important way to prepare everyone involved for the adoption, make sure they understand its implications, and protect the child's best interests. People would know help is available if they need it before, during and after an adoption is finalised.

Examples of the types of support that could be offered to people involved in adoption include:

- Culturally sensitive counselling with a specialist counsellor could be provided before, during or after an adoption. This could help people work through their emotions and feelings relating to the adoption.
- Encouraging the use of support groups to connect people who have similar adoption experiences.
- Expanding education programmes. For example, programmes could cover ways to navigate contact agreements, ways to answer an adopted child's questions, and any other relevant areas.
- Tailored education programmes for specific types of adoption, such as intercountry adoptions, cross-cultural adoptions, relative or step-parent adoptions, adoptions when the adoptive parents have biological children, or when an older child is adopted.
- Expanding the types of information available. For example, information could be given about how to access original birth records, contact details of counsellors, or the rights of the wider family and whānau.

There are also options for how these types of services are provided to people. For example, people could choose to access services when they want or need them, or the law could make it compulsory to access some types of services, such as pre-adoption counselling. We will also need to think about whether the government should fund, or partially fund, some of these services.

**We want to hear your views on how people access adoption support services, in particular:**

- **Children and people who have been adopted**
- **Birth parents**
- **Adoptive parents**
- **Birth family and whānau**

**Do you think changes need to be made to the information and support those groups receive before, during or after the adoption?**

**What do you think about the options we've discussed?**

**Are there any other options you think we should consider?**

## **Birth certificates after an adoption**

Every person born in Aotearoa has details of their birth recorded in the Birth Register. This record includes details of their birth, including the names of their birth parents. The Birth Register is looked after by the Registrar-General, part of the Department of Internal Affairs. The Registrar-General issues birth certificates, which certify that the information on the certificate is what is held on the Register at the date the certificate is issued. When a person is adopted, their original birth record is closed, and a new record is created to replace it.

Birth certificates issued after an adoption can only be issued from the new birth record. They show the child's adopted name and the names of the adoptive parents in place of the child's birth parents. Adoptive parents may choose for the child's birth certificate to describe them as 'adoptive parents'. They can change this at any time up until the child is 18 years old, but the child must agree to the change if they are 16 or 17 years old. Once the child is 18 years old, they get to decide whether their parents are listed as adoptive parents in the Birth Register. Their choice is reflected in any new birth certificates that are ordered.

### ***Issues with the current approach***

While the post-adoption birth record correctly shows the new legal relationship, it also looks like the adoptive parents gave birth to the child. This creates a 'legal fiction' that can cause harm to both the child and the birth parents. It can result in people who have been adopted having problems accessing information about their birth parents and wider family and whānau, and developing a sense of identity.

These days birth and adoptive families and whānau often have contact and/or share information after an adoption. For many children, there is an open and easy environment in adoptive families and whānau for children to ask questions about being adopted and have their questions answered by their adoptive parents. Despite this, the law relating to birth records still reflects past beliefs that it's better for everyone involved if the adoption results in a 'clean break' and is secret. There may still be barriers for people who are adopted finding out who their birth parents are.

## Options for change

Changes could be made to the way adoption information is recorded and what is shown on the birth record post-adoption, such as:

- Including both the birth parents and the adoptive parents on a birth certificate after an adoption. This would make sure that people are aware they're adopted and who their birth parents are. However, this document is regularly used to prove identity (e.g. to verify identity when making financial transactions or renting a house) and some people may not want it made public that they are adopted.
- Creating two types of post-adoption birth certificates – one with the names of the adoptive parents, and one with the names of both the birth parents and adoptive parents. A person who has been adopted would have access to three birth certificates in total, including their original. People who have been adopted would then have complete information and could choose between using the second or third certificate for legal purposes. However, the use of different certificates could cause confusion, particularly for legal matters.
- Introducing a new, different type of document that shows the adoptive parents as the child's legal parents but doesn't change the child's original birth certificate. This would mean that it wouldn't look like the child was born to the adoptive parents. Any digital information shared (e.g. to enrol children in school, or to confirm eligibility for a benefit) would show the child's legal parents.

Alternatively, the current approach could be kept as it makes the legal relationship between the child and adoptive parents clear. Changes made to other parts of adoption laws could make it easier to obtain adoption information so that changing the certificate itself may not be needed.

**Do you think changes should be made to what birth certificates look like after an adoption?**

**What do you think about the options we've discussed?**

**Are there any other options you think we should consider?**

## Access to adoption information

A person who has been adopted must be at least 20 years old before they can apply for their 'original birth certificate'. An 'original birth certificate' provides information from a person's original birth record which was closed when the adoption was made. Birth parents also can't apply to access information about the child they placed for adoption until the child is 20 years old. This is to protect the privacy of person who has been adopted. Since 2011, on average 489 original birth certificates have been provided each year. Wider family and whānau members can't access a relative's 'original birth certificate'.

The law on 'original birth certificates' for people who have been adopted is different to how the law treats other birth certificates. Birth certificates for people who are not adopted, and post-adoption birth certificates, can be purchased by anyone, except in rare circumstances.

For adoptions that took place before 1 March 1986, people who have been adopted and birth parents are able to place a 'veto' on their information held by the Department of Internal Affairs. A veto will show as a note on the record that they don't want their identifying information to be shared with the other person. The Department of Internal Affairs is not allowed to share a full original birth certificate if a veto is in place. As at December 2020, there were 201 active vetoes, with the majority of placed by birth mothers. Between 2016 and 2020, six people who were adopted tried to access their original birth certificate but weren't able to as there was an active veto in place. The veto system reflects that these adoptions took place during a time when adoption information was expected to be kept secret.

Adoption information is also usually held by Oranga Tamariki and the Family Court. In some cases, particularly historical cases, non-government organisations may also hold relevant adoption information.

A person who has been adopted may apply to Oranga Tamariki, with a copy of their 'original birth certificate' (showing what is on the person's original birth record), for identifying information relating to their birth parents. Oranga Tamariki can share all available identifying information about a parent listed in the original birth certificate or if the birth parent has died. Oranga Tamariki may also hold some medical or genetic history of the birth parents or person has been adopted.

A person who has been adopted can also apply to the Court for the Court's adoption records. Court adoption records will include the information that was filed at the time the adoption application was made, including the social worker report. The Court may grant access if there is a 'special ground'. For example, where Oranga Tamariki may have no information to share, or the person who has been adopted needs to establish a cultural entitlement based on whakapapa and iwi affiliation. The Court might say there is a special ground if there is no need to protect privacy, for example because the other parties have died or already know of the person.

### ***Issues with the current approach***

The current law makes it hard for a person who has been adopted to find out who their birth parents and birth family and whānau are, including information about their culture and heritage. It can stop people who have been adopted from finding out health information such as family medical histories.

The veto system was originally designed to protect the privacy of people who have been adopted and birth parents during the era of closed adoptions. However, the small number of people still affected by vetoes are still not able to access any information about themselves.

The current restrictions also apply to birth parents. Where they have not been involved in an open adoption, the birth parents may want the option of making contact later in life. Birth fathers may find it especially hard to access this information if their name isn't on the original birth record.

In practice, accessing adoption information held by Oranga Tamariki is difficult. A person can't access information without an 'original birth certificate'. This means the same restrictions that apply to accessing birth certificates also apply to accessing Oranga Tamariki-held information. Oranga Tamariki may have the birth father's information on its



files, but if the birth father isn't included on the 'original birth certificate', Oranga Tamariki isn't legally able to share the information.

The Court has said that 'special grounds' for accessing the Court's adoption records is a high threshold. An interest or desire to meet someone probably won't meet the threshold.

The current law prevents wider family and whānau members from accessing a relative's original birth record. This can stop biological siblings, grandparents and other relatives from connecting with each other. The inability to find family members can have intergenerational effects, such as for children and grandchildren of people who have been adopted.

The barriers to accessing adoption information are out of step with current adoption practice, which often results in the child, their adoptive family and whānau, and their birth family and whānau having regular contact. Commercial DNA testing and matching is also now more common, meaning biological connections can be discovered outside of the government's birth record-keeping.

### ***Options for change***

The right to identity says that people should have access to information about who they are. This needs to be balanced against the right to privacy of others involved, including the birth parents, family and whānau. Some people may see adoption as a very private and personal matter.

The law could be changed to make it easier for people who have been adopted and birth parents to access the original birth records. It could do this by:

- Lowering or removing the current age restriction. People would have earlier access to their information which would help them develop a sense of identity as they are growing up.
- Allowing the birth parents, or wider family and whānau of a birth parent or person who was adopted, to access an original birth record. Siblings would be able to reconnect, and later generations would be more easily able to understand where they come from.
- Phasing out or removing the veto system for adoptions made before 1 March 1986. This could mean, for example, allowing those with a veto currently in place to have it for a period of time before removing it completely. This option would need to balance birth parents' right to privacy against the right to identity for the person who has been adopted.
- Removing the requirement to provide an 'original birth certificate' to access identifying information in Oranga Tamariki records.
- Allowing the Court to grant access to the Court's adoption records if it is satisfied the person has a genuine interest in the record. This would expand who is able to access adoption records and may make it easier for people to find out information about themselves or family and whānau members.
- Creating a separate system for storing and sharing information about the identity of a person who has been adopted that could sit alongside the birth certificate process. It could include information relating to a person's whakapapa, culture and heritage. It could also include relevant genetic and medical information.

**We want to hear your views on how people access adoption information, in particular:**

- **Children and people who have been adopted**
- **Birth parents**
- **Birth family and whānau**

**Do you think changes should be made to the way people from those groups access adoption information?**

**What do you think about the options we've discussed?**

**Are there any other options you think we should consider?**

**Do you think changes should be made to the current veto system for adoptions made before 1 March 1986?**

**What do you think about the options we've discussed?**

**Are there any other options you think we should consider?**

# Surrogacy and the adoption process

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Adoption is the only way intending parents can become the legal parents of a child born by surrogacy. This adoption law review will look at ways to improve the adoption process when a child is born by surrogacy.

The Government has also asked Te Aka Matua o te Ture | Law Commission, Aotearoa New Zealand's independent law reform body, to carry out a wider review of surrogacy and related issues. The Law Commission is looking at broader questions relating to surrogacy, including whether there should be a different process than adoption for intending parents to become legal parents of a child born by surrogacy, and how international surrogacy arrangements should be provided for in law. The Law Commission will be asking for public submissions later in 2021. You can find out more about the Law Commission's review and sign up to receive updates here: [www.surrogacyreview.nz/](http://www.surrogacyreview.nz/)

The Hague Conference has also set up an Experts' Group to consider issues related to international surrogacy. More information on the Experts' Group work can be found here: [www.hcch.net/en/projects/legislative-projects/parentage-surrogacy](http://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy)

Broader issues relating to surrogacy have not been included in this discussion document because they will be looked at in the Law Commission's review. Instead, this discussion document looks at issues relating to the adoption process itself once a child is born by surrogacy. This will mean that adoption law can continue to address surrogacy, pending the completion of the Law Commission's review.

## What is surrogacy?

Surrogacy is an arrangement where one person agrees to become pregnant and carries and delivers a child for the purpose of giving parental responsibility of the child to another person(s) after birth. The person who agrees to become pregnant and carry and deliver the child is referred to as the surrogate. The person(s) who enter a surrogacy arrangement with a woman to become pregnant, carry and deliver a child on their behalf is referred to as the intending parent(s).

There are two types of surrogacy:

1. **Traditional surrogacy** is where the surrogate uses her own eggs with either an intending parent's or a donor's sperm. Traditional surrogacy may take place with or without the help of a fertility clinic;
2. **Gestational surrogacy** is where the surrogate does not use her own eggs. Instead, an embryo is created using the eggs and sperm from the intending parents or donors. In this type of surrogacy, the child is usually genetically linked to one or both of the intending parents. Gestational surrogacy requires the help of a fertility clinic to perform an in vitro fertilisation ('IVF') procedure.

Changes that are made as a result of adoption reform will also impact on adoptions for children born by surrogacy. For example, if changes are made to the rules around consent, it could take longer to process an adoption. Any changes to the legal effect of adoption could have a significant impact on the child's relationship with their intending parents and might not be appropriate in the context of surrogacy. The consequences of such changes on adoptions following a surrogacy arrangement will be thought about as proposals are developed.

### ***Legal relationship between intending parents and children born by surrogacy under the law***

Under the current law, the woman who gives birth to a child is recognised as the child's legal parent. If the woman has a partner, they are also recognised as the child's legal parent. For children who are born by surrogacy, this means that the surrogate (and her partner, if relevant) are the child's legal parents when the child is born.

Intending parents are not recognised as the legal parents of a child born by surrogacy, even if the child is genetically related to one or both of them. Until a final adoption order is made, the surrogate (and her partner, if relevant) will be the legal parent of the child.

## **Domestic surrogacy arrangements**

If both the surrogate and the intending parent(s) live in Aotearoa, it is a domestic surrogacy.

In traditional surrogacy cases, intending parents don't need to engage with Oranga Tamariki before making an adoption application. For most cases, Oranga Tamariki social workers only meet the intending parents once they are asked to provide a social worker report to the Court. In some traditional surrogacy cases, the intending parents may choose not to go through the adoption process at all and they will not be required to have home assessments before they start the adoption process.

In gestational surrogacy cases, intending parents use a fertility clinic that help them through the surrogacy process. Intending parents must get approval from the Ethics Committee on Assisted Reproductive Technology ('ECART') to go through an assisted reproductive procedure. As part of the ECART process, intending parents have to provide a letter from Oranga Tamariki outlining their suitability to adopt. This means that Oranga Tamariki is involved in gestational surrogacy cases at an early stage, before ECART approves the assisted reproductive procedure. Once the child is born, the adoption process is the same.

Oranga Tamariki undertakes three assessments to decide the suitability of intending parents before they can adopt a child born by surrogacy:

1. **Early assessment:** Applicants complete police checks, medical reports, and references as part of this assessment. A social worker will discuss the proposal with the intending parents. Intending parents are also provided information about the adoption process following the child's birth. Oranga Tamariki provide the applicants with a letter outlining their likely ability to satisfy the criteria of the Adoption Act to go with their application to ECART.

2. **Updated assessment:** Once a pregnancy is confirmed, the social worker updates their assessment. The social worker also discusses with the intending parents how they plan to build attachment with the child and their plans to tell the child their conception story.
3. **Social work report:** Once the intending parents have applied to adopt the child, the Family Court will request a social worker report as in usual adoption applications. The social worker will report on the applicants' suitability, as well as the child's wellbeing post-birth and the attachment between parent and child.

The purpose of the assessments is to make sure that the child will be protected and supported by the family who will care for them. The suitability assessments help the Court decide if the adoption is in the best interests and welfare of the child.

As with the usual adoption process, the surrogate needs to agree to the adoption. If the surrogate has a partner, the partner also needs to agree to the adoption as they are also the child's legal parent at birth.

### ***Issues with the current approach***

The current process takes time and is expensive. There isn't much information available on the adoption process, including the relevant assessments, for people thinking about surrogacy arrangements.

For gestational surrogacy cases, intending parents have their suitability assessed when getting ECART approval and then again as part of the adoption. Some people may think these assessments are not needed and delay the adoption process. It means that intending parents don't have the legal rights and responsibilities toward the child until the adoption is granted.

By contrast, there may also be concerns that there are no assessments being carried out in traditional surrogacy cases. This may create risks for children because there is no oversight to make sure that the child's best interests and welfare are being considered.

### ***Options for change***

As noted above, the Law Commission is looking at whether there should be a different process than adoption for intending parents to become legal parents of a child born by surrogacy. The Law Commission will be consulting on options for change later in 2021.

While the Law Commission's review is going on, changes could be made to improve the adoption process where a child is born by domestic surrogacy. Some examples of the types of changes that could be made include:

- Providing user-friendly information on the adoption process following a surrogacy arrangement.
- Changes to home visits for intending parents. This could include reducing the number of visits to intending parents in both gestational and traditional surrogacy arrangements or changing the agency that carries out home visits to better align the surrogacy and adoption processes.

These changes could apply in all domestic surrogacy cases, or they could apply only in gestational surrogacy cases where the surrogate and intending parents have gone through the pre-conception checks.

**Do you think there should be any changes to the adoption process where the child is born by domestic surrogacy?**

**What do you think about the options we've discussed?**

**Are there any other options you think we should consider?**

## **International surrogacy arrangements**

Some people enter surrogacy arrangements overseas rather than in Aotearoa. Our current adoption laws don't specifically provide for international surrogacy. Like in domestic surrogacy cases, the law recognises the surrogate as the legal parent of the child at birth. This is usually the case even if the overseas country says the intending parents are the child's legal parents at birth. A child born by international surrogacy arrangement therefore also needs to be adopted. The adoption can happen in either Aotearoa or in the overseas country.

International surrogacy is much more complex than the domestic surrogacy process. It requires considering the laws of two different countries. Countries around the world regulate surrogacy practices differently. Some countries' surrogacy practices are heavily regulated, while others are not regulated at all. This means that some international surrogacy arrangements may not have protections for the child born by surrogacy, the surrogate or the intending parents.

### ***Issues with the current approach***

There is no central point of information on the adoption process for intending parents in international surrogacy arrangements. This means intending parents could enter international surrogacy arrangements without having a good understanding of the full process and may not be aware of the risks.

### ***Options for change***

The Law Commission is looking at the issues with international surrogacy arrangements and will be consulting on options for change later in 2021. While the Law Commission's review is ongoing, there could be changes made to the information that is provided on the adoption process in international surrogacy cases.

For example, user-friendly information on what the adoption process looks like for people who have a child by an international surrogacy arrangement could be created. This could help people make more informed decisions before entering an arrangement and make sure they are aware of the complexities in international surrogacy adoption cases.

**Do you think there should be any changes to the adoption process where the child is born by international surrogacy?**

**What do you think about the option we've discussed?**

**Are there any other options you think we should consider?**

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